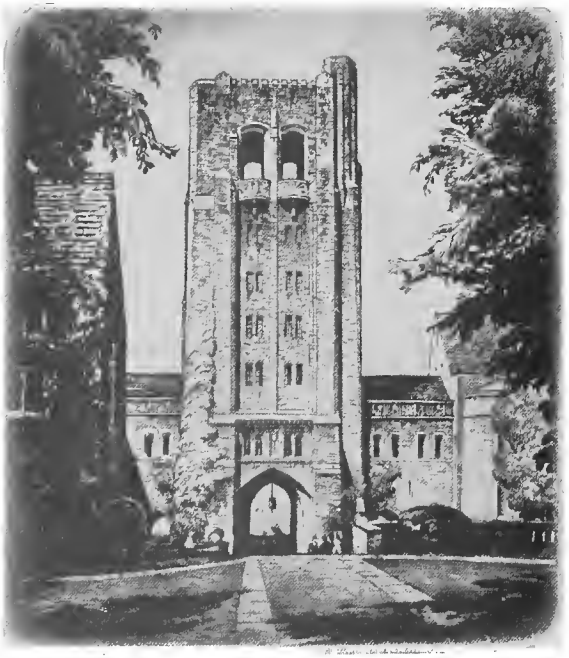

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THE LAW OF PRIVATE RIGHT.

BY

GEORGE H. SMITH.

NEW YORK
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ENTERED AT THE NEW YORK POST OFFICE AS SECOND-CLASS MATTER.

THE LAW

OF

PRIVATE RIGHT

BY

GEORGE H. SMITH,

Author of "Elements of Right, and of the Law," and of Essays on "The Certainty of the Law, and the Uncertainty of Judicial Decisions," "The True Method of Legal Education," and other subjects.

Natura enim juris explicanda nobis, eaque ab hominis repetenda natura.

NEW YORK:

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PREFACE.

THE following work, being the substance of the general or introductory part of a course of lectures upon the Law of Private Right as administered in this country, delivered before the Los Angeles Law Students' Association, owes its origin to a conviction entertained by the author that the theory of jurisprudence now generally prevailing in England and in this country is fundamentally erroneous, and that to this is to be attributed, as to a common source, the loose and inaccurate character of our modern text-books and judicial decisions, the low standard of professional education, the uncertainty in the administration of justice, and the generally unsatisfactory condition of the law in all its aspects at the present day.

In the following pages I have attempted to expose the radical errors of the theory referred to, and also to expound the true theory of the law, which, though generally recognized by the jurists of other countries and former ages, seems, since the time of Austin, to have been lost to the profession in this country and England, and, indeed, to the English-speaking race generally.

How far I have succeeded, it is not for me to say. But I may, at least, claim for the work—whatever its merits or demerits in other respects—that it is a pioneer on the road that must be traveled before any improvement in the existing degenerate state of the law, and of its literature, can be looked for.

GEORGE H. SMITH.

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INTRODUCTION.

§ 1. *Explanation of the Design and Scope of the Work.*

THE objects which I have proposed to myself, and which I have kept steadily in view in the preparation of this work, are fourfold, viz.:

1. To explain the nature of the law and the nature of its several subjects or parts, and their relation to one another;

2. To set forth and explain those general principles of natural right upon which every system of law is based, and which in every system constitute, not in bulk, but in extent and frequency of application, the chief part of the law of Private Right;

3. To give a brief account of the principles and rules, both of law and equity, which have grown out of the historical development of our law, and are therefore peculiar to the system; and

4. To explain and illustrate the method of the law of Private Right, or, in other words, the true method of investigation and reasoning to be used in determining controversies between men as to their rights.

That the ends proposed, and thus briefly stated, may be better understood, I will add a few words of explanation.

With regard to the first, it is necessary only to remark that the law is, in this respect, like other sciences or subjects of inquiry, and that, in studying it, it is essential for the student to acquire, at the very outset of his course, a clear and correct, and, as far as possible, adequate notion of the nature of the law and of the questions or problems presented by it, and also of its several divisions or parts, and their relation to one another. This information, once acquired, will serve as a clew or thread to guide him through the labyrinth of law, and will enable him, in taking up any subject for study, to understand at once the nature of the problem to be investigated, the place of the subject in the law, and its relation to other subjects. It will enable him also, as he proceeds with his studies, to bring together in its natural correlation the information acquired; and the knowledge thus obtained will gradually form itself in his mind, not as a loose mass of arbitrary rules, difficult to remember or to recall when needed, but as an organic whole, requiring no effort of the memory to retain it, and ever ready to suggest itself when required for use.[1] In no other way, in my opinion, can the law be readily mastered and retained; and to the lack of this, more than to any other cause, is to be ascribed the failure of existing methods of instruction. For it is an unfortunate fact, and one very discreditable to the profession, that the definition

[1] The Roman lawyers were distinguished for the habit of thus regarding the law, in its scientific unity, as a consistent whole, and hence resulted the remarkable consistency, or, as they called it, elegance (*elegantia*) of the Roman law.

and the divisions of the law in our books are altogether incorrect, and serve only to mislead and confuse the student.

With regard to the second and third of the objects proposed, a more extended explanation will be necessary.

The law, as described by the great Lord Mansfield, is nothing else than reason modified by custom and authority. Hence, every system of law is composed of two elements, which may be described as the *rational* or *scientific* element, and the *historical.* For all systems of law agree in their main features and in their general principles, which are, in the main, rational in their character, but differ from each other in this: that there are in each certain peculiar rules established by statute or custom, which constitute its historical element.

These two elements were distinguished by the Roman lawyers by the terms *jus civile* and *jus gentium*, or *jus naturale.* "Every people," they said, "ruled by laws and customs (*legibus et moribus*), uses partly its own peculiar law, and partly a law common to all men; for that law, or part of the law, which each people has established for itself, is peculiar to the State, and is called the *jus civile*, as belonging peculiarly to the State; but that law which natural reason has established among all men is observed generally among all peoples, and is called the *jus gentium*, as being the law which all nations use."[1]

The distinction thus made by the Roman lawyers corresponds precisely with that of Aristotle, who divided the law into the νόμος ἴδιος, or peculiar law, and the νόμος κοινός, or common law, the former of which he defined as the law, or part of the law, which each State has established for itself, and which is therefore peculiar to it; and the latter as that which is conformable merely to the dictates of Nature, and which appears to be recognized among all men.[2]

[1] Jus autem civile a jure gentium distinguitur: quod omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi ominum hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utantur. Et populus itaque Romanus partim suo proprio, partim communi ominum hominum jure utitur. *Inst.* 1, 1, 1.

[2] Eth., Bk. 5, Ch. 6, 7; Rhet., Bk. 1, Ch. 10 and 13. Considering the difficulty of the subject, and the period at which he wrote, perhaps no other part of the works of Aristotle exhibits more favorably the character of his original and profound genius than his views of the law.

The subject is treated at large by Dr. Taylor, in the "Elements of Civil Law," in his chapter on the "Law of Nature," from which we extract the following: "Natural Law is the Rule and Dictate of Right Reason. . . . Positive, Voluntary, Arbitrary or Instituted Law . . . is that which does not flow from the general condition of human nature, but has for its objects things merely indifferent, and is founded in the sole pleasure of the Legislature. And these [after quoting Aristotle] are the very words of the Emperor: '*Omnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur.*'

"For both writers, by *common* or *universal*, mean *natural* law, and by *private* or *particular*, the proper institutions of separate communities, differing from each other according to the different features of government, the wants and exigencies, the temper, disposition and other circumstances of each society . . . so that Aristotle's distribution stands thus (translating the Greek):

THE LAW (νόμος).

The Common or Natural Law.	The Peculiar or Instituted Law.	
	Unwritten.	Written.

"This twofold division of law, as it is the earliest, so it is, perhaps, the best, and

The distinction also corresponds to the distinction made in our law between the *principles* and the *rules* of the law, and between reasoning from *principle* and reasoning from *authority*, of which the one consists merely in applying the established rules of the law to cases coming within their explicit terms, and the other in logical deduction from principles. To the former applies the maxim, *Quod vero contra rationem juris receptum est, non est producendum ad consequentias*;[1] to the other, the maxim, *Ubi eadem ratio, ibi idem jus.* Or, as the distinction is expressed by Bacon: "Let reason be prolific, but custom sterile, that it may breed no cases. Therefore, what is received against the reason of the law, or even where its reason is obscure, is not to be drawn into consequence."[2]

The *jus civile*, or peculiar law, considered with reference to its importance and the generality of its application, constitutes in every system but a comparatively inconsiderable part of it, and the *jus gentium* or *naturale*, or common law, the principal part.

The latter is purely rational and scientific in its character, and can be taught scientifically precisely as geometry is taught; and, as it constitutes the principal part of the law, it follows that the law can in the main be taught in a purely scientific manner. Taught in this way, I believe it to be practicable to compress in a very small space what is now spread through hundreds, and even thousands, of volumes.[3]

The law, however, cannot be learned wholly in this way; for every system of law is so implicated with arbitrary and accidental rules, established by statute or custom, that it is impossible to understand the text-books and reports without being familiar with this historical element; and a familiarity with this element is the more essential from the fact that the technical terms used in each system are generally of historical origin. Accordingly, I have aimed to give a clear notion, as well of the historical as of the scientific or rational part of the law; which is but to state again the second and third of the objects above specified.

With regard to the method of the law (the explanation of which is the fourth of the objects proposed), I will say nothing for the present, except to refer briefly to a very prevalent misconception of the subject.

has been generally received by lawyers and philosophers." (Elements of Civil Law, 3d edit., pp. 99, *et seq.*)

[1] Dig. 1, 3, 14; cited in Broom, Leg. Max.

[2] *De Augmentis*, Bk. 8, Ch. 3, Aph. 11.

[3] It is doubtless true, as remarked by Mr. Holmes in his able work upon the *Common Law*, that for the exposition of the law "other tools are needed besides logic." But it is a great practical error not to recognize the fact that logic is, and always has been, the principal tool, and that it does, in fact, constitute the life of the law. Nor could a greater practical mistake be made than to attempt to impart a knowledge of the law to the beginner by mere historical exposition. To this the student must resort in the further progress of his studies; but at first it should be resorted to no further than is absolutely necessary to enable him to understand the books. Hence, for the beginner, the *dogmatic* is the preferable method, and the *historical* should be deferred to a later period. Nor should it ever be forgotten that the historical element of the law at any given time owes its force to its then reception, and not to the fact that it had anciently been received. Hence, when any part of it has fallen into disuse, it is no longer part of the law; nor is it of any interest to the jurist, unless he be also an historian, save as it may explain the present condition of the law. Nor can there be a greater mistake than to suppose that the historical facts of early times are the germs out of which the law has been developed. The development of the law consists in the eradication of its historical element, and the substitution of rational principles; and of this development logic is the principal instrument.

Of late years the notion has sprung up, and has become more and more prevalent, that all questions of law are to be decided simply by referring to some statute, or some rule established by precedent. If this were so, all that would be required of the lawyer would be a facility in hunting up authorities and a retentive memory. But this is very far from being the case. Where an authority is found, the still more difficult task remains to determine its value, and this can only be determined by means of a thorough familiarity with the general principles of the law, and by the exercise of our independent reason. This is one of the most important functions of the lawyer, and perhaps in no other respect is the difference between the thorough and the mere case lawyer so manifest as in the capacity for performing it. In this and in other ways, the function of the lawyer involves, in the highest degree, the exercise of the reasoning or logical faculty. He must, if he would be a competent jurist, possess the faculty of broad and comprehensive generalization, and also that of fine and accurate distinction; he must be capable of correct and scientific definition, and of reasoning boldly and logically from his premises, and of forming confidently his own conclusions. If these should agree with the rules established by the prevailing authorities, then he will understand the reason of the law; in which, as Chief-Justice Holt justly observes, the law in fact consists. If, on the other hand, an authority should appear to him to be in conflict with the settled principles of the law, then, in most cases, he will not hesitate to reject it; and at all events, even if, like Galileo, he is forced by authority to acquiesce in a false proposition, he will still be able to perceive its falsity, and will thus at least preserve the integrity of his intellect and his conscience, which by any other course must be seriously impaired; for nothing can be more destructive to the reasoning faculties than to accept as true what is logically false, or to the conscience, than to confound the just and the unjust.

In short, without this independent exercise of the reason, the faculty of judging of the decisions, and even of understanding or of correctly applying them, will be lost. This was illustrated by the condition into which the Roman lawyers had fallen in the time of Justinian, and for some centuries previous—who had, in fact, as is remarked by Mackeldey, lost entirely the capacity of weighing the authorities, and of judging their relative values. To supply this defect, various ineffectual expedients were resorted to. For example, certain jurists were named whose authority, when accordant, should be conclusive; where they differed, the majority was to prevail; and, where they were equally divided, the authority of one (Papinian) was to determine. The expedient, of course, proved entirely ineffectual, as must be the case with all devices for supplying the want of the reasoning faculty in lawyers and judges; and hence, on account of the continued inefficiency of the judges and lawyers, and the consequent confusion in the administration of justice, it was found necessary to codify the law, which resulted in the *Codes*, the *Pandects*, and the *Institutes* of Justinian.[1]

[1] The collections of Justinian are often referred to by the advocates of the codification of our own law with too much praise. In the opinion of the most competent authorities, the work was very badly done. The event took place after the fall of the Western Roman Empire, and at a period when every spark of original genius, either in the law or in literature generally, had become extinct among the Roman people.

The profession of our own country and time has gone very far in the same direction, and the same remedy is proposed; but this decadence in the genius of the English and American bar I regard as the consequence of accidental causes only; and it needs but the introduction of better methods, of which many signs appear, entirely to arrest it.

§ 2. *Of the Definition of the Law.*

The term "the law," accordingly as it is used by the English or the American lawyer, varies somewhat in meaning. The former, when he uses it, has in view the law of England, a single State; the latter, though he sometimes refers to the law of his own State, most commonly has in view the American law, or the law common to all the States. For though the several States are, with reference to each other, and, with certain well-defined exceptions, with reference also to the Federal Government, sovereign or independent political communities, each with its own legislature and system of courts, yet substantially the same system of law is administered, with one exception, in the courts of all the States, and also in the Federal courts. To this common law of all the States, or, as it may be called, the "American Common Law," and not to the law of any particular State, our textbooks are almost exclusively devoted; and, in accordance with this custom, it will constitute the subject of our present investigations.

In these investigations our first inquiry will be as to the nature of this law, or rather—as all systems of law are in essential nature the same—as to the nature of *positive*, or, as Blackstone calls it, *municipal* law in general. In which task we can receive but little aid from the various definitions given in the books; for these are so various and conflicting that it will be impossible to reconcile or even intelligently to discuss them until we have investigated in detail the nature and general principles of the law. Indeed, even could a correct definition be devised, it would be of little service to us at the present stage of our investigations. For, to the student just entering upon the subject, it would carry with it but a vague meaning; while, to older lawyers, owing to inveterate errors almost universally prevailing as to the nature of the law, it would probably serve only to excite prejudice against the views of the author; and it would thus prove, in the expressive language of Scripture, to the one a "stumbling-block," and to the other "foolishness." We must, therefore, regard the definition of the law rather as the end and crown than as an appropriate beginning of our labors.

But, while even a perfect definition of the law would do but little to help us at the threshold of our inquiries, an incorrect definition, by giving us a false notion of the law, and misleading us as to the method to be pursued in studying it, may do us infinite harm; and hence it will be necessary for us to examine at some length the various definitions that have been offered—so far, at least, as may be necessary to avoid being misled by them.

Nor should the somewhat protracted attention we are about to devote to the subject of definition be regarded—as it probably will be by some—as wasted. For it is not an exaggeration to say that

It had no effect in improving the Roman lawyers; but perhaps it was a necessary expedient at a time when the bar, as well as the people generally, had so profoundly degenerated.

nearly all errors of human thought in social and political science may be traced to errors engendered by a misconception of the meaning of words. "Men imagine," says Bacon, "that their reason governs words, while, and in fact, words react upon the understanding; and this has rendered philosophy and the sciences vain and inactive."[1] Or, as he otherwise expresses it, "words still manifestly force the understanding, throwing everything into confusion, and lead mankind into vain and innumerable controversies and fallacies."[2] Hence, what is sometimes contemptuously called *logomachy*, or fighting over words, is often the decisive battle by which a theory is established or overthrown. And this, indeed, will be found to be the case with the subject under investigation; which, in fact, will be found to furnish the most remarkable instance in the history of philosophy of this tyranny of words over the human mind.

The definitions of the law given in the books, though varying widely in terms, may all be reduced to four, of which, however, the first three only are real definitions, and the last a mere description of the law.

The first, in effect, defines the law as being a mere expression of the will of the State; or, in other words, as consisting altogether of laws (*leges*), or statutes. To this effect is the definition of Blackstone, as amended by Christian; viz., that the "law is a rule of civil conduct prescribed by the supreme power in a State;"[3] and also the definition of Austin, that a law is a command of the sovereign, and the law an aggregate of such commands;[4] and that of the code of the New York Code Commissioners, which defines the law as "a rule of property and of conduct prescribed by the sovereign power of the State;"[5] and also that of the California Code, according to which it is "a solemn expression of the will of the State."[6] These definitions are all, in effect, the same; and, though embodying a conception of the law now almost universally prevailing, are so palpably in conflict with patent and notorious facts that their acceptance must ever remain at once a reproach to the intelligence of English and American lawyers, and the most curious of all phenomena in the history of philosophy. For no fact is more obvious or more fully recognized than that the law has been developed, not by the legislature, but by the courts in the ordinary exercise of their jurisdiction; and that, so far as its formal expression is concerned, it is to be sought, not in the statutes (which constitute but an inconsiderable part of it), but in the decisions of the courts. The definition is, therefore, obviously untrue even when applied to the law of a particular State, and is still more manifestly so when applied to the American law, which has neither a common lawgiver nor common tribunals, and which, therefore, obviously cannot be brought under the definition.

We might, therefore, at once dismiss the subject from further consideration, were it not for the influence the definition has exercised, and still continues to exercise, upon the professional mind in this country and in England—an influence so profound and deleterious that, until removed, it will stand as an insuperable obstacle to the intelligent study of the law. On this account, therefore, some further consideration of the subject will be necessary.

The definition in question originated in an unfortunate mistake of

[1] *Nov. Org.*, Aph. 59. [2] *Id.*, Aph. 43. [3] 1 Blackstone, Com. 44.
[4] 1 Austin, Jur. 91. [5] N. Y. C. C., sec. 2. [6] Pol. C. 4466.

Sir William Blackstone as to the meaning of the term *jus civile*, as used in the Roman law. According to the conception of the Roman lawyers—as we have already explained—the law is made up of two elements, viz., the *jus gentium* and the *jus civile*, the former consisting of those rational principles which are common to, and indeed constitute the principal part of, all systems of law; and the latter, of the arbitrary or accidental rules peculiar to any given system. According to this view—which is obviously the true one—the *jus civile* constitutes, not the whole, but only a part of the law; and indeed—if we have regard to importance rather than bulk—we may say a very inconsiderable part of it. But Blackstone unfortunately mistook it for the whole, and avowedly founded his definition upon it.[1]

So obvious a blunder could hardly have occurred, and still less, for over a century, have escaped detection, had it not been for the unfortunate ambiguity of the term, "law"—which, in its most familiar sense, denotes a law or statute (*lex*), or an aggregate of such laws; but which is also used to denote the more complex subject, which we call the law, and which in its latter application has naturally carried with it its more familiar connotation.

For, in all other languages but our own, what we call the law is denoted by a term signifying *right:* as, for instance, in the Latin by *jus;* in the German by *recht;* in the French by *droit;* in the Italian by *diritto*, etc.—a usage once common with ourselves, and not yet altogether obsolete; as, for example, in the term *Folk-right*, the ancient name of the Common Law, and, in its later equivalent, "Common Right."[2]

By this usage of terms, and by their familiarity with the conceptions of the Roman jurists, the lawyers of Continental Europe have been preserved from this error; and hence the conception of the law involved in the definition is a peculiar growth, or rather excrescence, of English jurisprudence, and, as observed by Sir Henry Maine, is not so much as "known on the Continent at all."[3]

To Blackstone himself and to the lawyers of his time the definition carried with it but little significance. They knew the law too well to be misled by it; and hence their practical conception of the law, as evidenced by their works, was altogether different from, and inconsistent with, that embodied in their formal definition. But unfortunately the definition fell into the hands of Bentham and Austin, by whom, or rather by the latter of whom, it was developed into a formal and comprehensive theory—which has of late years, in England and this country, almost entirely usurped the whole domain of theoretical jurisprudence, and which has exercised, and still continues to exercise, an almost despotic dominion over the English and American mind.

This theory rests entirely upon the definition as its foundation, and is in fact but a mere series of deductions from it. Its principal tenets may be briefly stated in the following propositions:

[1] "Municipal or Civil Law," he says, "that is, the rule by which particular districts, communities, or nations are governed [is] thus defined by Justinian: *Jus civile est quod quisque sibi populus constituit.*" 1 Com. 44.

[2] "It [the Common Law] had an ancienter original than Edwin the Confessor, and was first called the *folc-right*, or the people's right." (Aston, J., in Miller v. Taylor, 4 Burr. 2343.)

"And it is to be observed, the Common Law of England is sometimes called *right*, sometimes *common right*, and sometimes *communis justitia*. In the Great Charter the common law is called right. *Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum.*" Co. Lit. 142.

[3] Vill. Com. 66.

1. The law is a mere expression of the will of the supreme government.

2. The courts in fact exercise legislative functions. Hence judicial decisions are mere expressions of the will of the State through its officers, the judges; and in their essential nature differ in no respect from statutes or legislative acts.

3. Custom is no part of the law until recognized and adopted by the government, either through its legislature or the courts.

4. International law is not law in the true sense.

5. Nor is constitutional law.

6. Rights are mere creatures of the will of the supreme government.

7. Hence there are no such things as natural rights.

8. Hence the State itself cannot have any rights, or be subject to any obligations, either as to its own citizens or as to foreign nations.

9. The legislative will is not only the source of rights, but the paramount standard of the just and the unjust, and of right and wrong generally.

10. The power of the sovereign is incapable of legal limitation; or, in other words, the supreme government is legally absolute, or despotic.

With a little reflection it will be perceived that all the above conclusions follow logically from the definition, and cannot be consistently rejected by anyone who accepts it.[1]

It is obvious, therefore, that the definition, as well as the theory based upon it, is subversive of human rights and liberty, and of morality itself; and the mere statement of the theory may be, therefore, taken as a *reductio ad absurdum* of the definition. We have dwelt at length upon this definition, because it is almost universally received by the profession, and because, as we have already remarked, so long as this continues to be the case no intelligent study of the law, in its scientific aspect, is possible.

The second definition defines the law as consisting of the general customs of the realm, or State.[2] This definition is of earlier date than the former, and is supported by the concurrent authority of all our writers, ancient and modern. The essential idea intended to be conveyed by it is beyond all question correct; for there is no fact more certain or more important than that all law rests in the main upon custom. But, as expressed, the definition is inaccurate; for it is obvious that custom is only one of the elements of the law.

The third definition regards the law as identical with justice. This is implied in our common speech; as, for example, when we speak of "courts of justice," or of "the administration of justice," and is expressly asserted by the highest authorities. Thus Bracton, following the Roman lawyers, defines jurisprudence, or the knowledge of the law, as "the science of the just and the unjust" (*justi atque injusti scientia*), and the law "as the art of the good and the equitable" (*ars boni et æqui*); and accordingly he says: "Justice, therefore, is the virtue, jurisprudence the science; justice the end (*summum bonum*), jurisprudence the means." And with this agrees precisely the definition of Sir Matthew Hale; according to which "the common law of

[1] This is shown more at length in an article published in the *American Law Review*, March–April. 1887, entitled "The English Analytical Jurists," where will be found condensed into a brief space a clear view of the theory of jurisprudence generally accepted in England and this country.

[2] 1 Blackstone, Com. 63.

England is *the common rule for administering justice within this kingdom;*" and also the forms of the old commissions to the judges, which were: *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ;*[1] and indeed the books are full of expressions of eminent jurists which, in effect, assert the same proposition.[2] But, to say the least, this definition is inaccurate; for the law is obviously made up in part of laws and customs, the former of which are purely arbitrary, and the latter to a large extent accidental, and both often unreasonable and absurd.

The common fault of all these definitions is that they each regard only a part of the law, and ignore the remainder. For the law is in fact made up of laws or statutes, customs, and principles of natural reason; and no definition which ignores either of these elements, or which fails to express the manner in which they are related to the law and to each other, can be accepted as satisfactory.

The fourth definition, or supposed definition, does not aim to express the essential nature of the law, but merely to distinguish and identify it, and thus to determine the proper subject of our investigation. According to it, the law is simply the aggregate of the principles and rules, whether arbitrary, accidental, or of natural reason, by which the courts are governed in the exercise of jurisdiction; or, as expressed by Sir Matthew Hale, "it is generally that law by which the determinations in the (king's) ordinary courts are guided."[3]

This definition, or rather description, of the law is equally consistent with all the definitions given, and indeed with any definition that can be devised. Hence it furnishes a common ground upon which the advocates of all theories of jurisprudence may stand at least equally well, and it may be conveniently used as giving a rough and approximately correct description of the law. Let it be assumed, therefore, for the purpose of defining the scope of our inquiries, that the law, whose nature we are seeking to ascertain is the law which the courts enforce, or at least are supposed to enforce; or, more specifically, that it is the aggregate of the rules and principles by which the courts are governed in the exercise of jurisdiction.

This description of the law, however, gives us no information as to the essential nature of the rules of conduct which are thus enforced, and which, according to it, constitute the law. It remains, therefore, to investigate the nature of these rules or principles, a problem purely historical, and which can only be solved by an examination of some actually existing system of law. In making this investigation we will, for obvious reasons, generally have in view our own, or the American, law; but what we will have to say will be equally applicable to all systems.

§ 3. *Division of the Law.*

The law is not a homogeneous whole, but consists of several different

[1] Co. Lit., 142 a. [2] See especially Co. Lit., 142 a, 158 b, 976, 97 b.

[3] This is also in effect the definition of Von Ihering, who defines the law as "embracing all the principles of law (*Recht*) enforced by the State." (Struggle for Law, 5); and that of Bliss, who defines it as "the aggregate of the rules recognized or prescribed by the supreme power of the State . . . regulating the property and personal relations of men" (Sov., 52); and that of Holland (Jur., 12), according to which "a law is a general rule of external conduct enforced by a sovereign power, and the law merely an aggregate of laws." In fact, however, these and the definition in the text are not definitions in the true sense, but mere statements of the subject to be defined.

parts or branches, which differ essentially in their nature. Its nature, therefore, can only be understood by an analysis and separation of it into its several parts, and by the division and subdivision of each part, until we have presented to our view, as a connected whole, the various subjects which make up the aggregate which we call the law. Our first step, therefore, will be to examine and analyze the law as it is actually administered by the courts.

If we observe the course of business in the courts of ordinary civil and criminal jurisdiction, we shall find that they are exclusively occupied either in determining controversies between individuals with reference to their reciprocal claims and demands upon each other, or in determining accusations of crime, which, in effect, are controversies between individuals and the State.

The power to hear and determine such controversies is called *jurisdiction*, and is either civil or criminal; the former consisting in jurisdiction over civil cases, or controversies between individuals, and the latter in jurisdiction over criminal cases, or accusations of crime.[1]

An obvious division of the law, therefore, is into the civil and the criminal law—the former being the branch of the law which governs the exercise of civil, and the latter that which governs the exercise of criminal, jurisdiction.

The criminal law in this country consists almost wholly of statutory enactments, which are simple in their nature and readily understood; and a sufficient knowledge of it for purposes of the general practitioner can, therefore, be readily acquired by the student by the perusal of the criminal code of his particular State, and perhaps, also, of some good text-book on the subject. It differs so essentially from the civil law in its nature that it will only produce confusion to consider them together; and we will, therefore, for the present, dismiss it from consideration, adding only that the civil law is the branch of the law with which lawyers in general are principally, and indeed almost exclusively, concerned.

The civil law is that branch of the law by which the determination of civil cases is provided for and governed, and it consists of the law of civil procedure and the law of private right (*jus privatum*).

The former will first be briefly explained. To every civil controversy there are two parties; viz., the plaintiff and the defendant (*actor* and *reus*). The former is he who demands relief from the court against another; the latter, he against whom the relief is demanded. The proceeding by which the demand is made by the plaintiff and resisted by the defendant is called a suit (*lis*), and also an action (*actio*). The latter term, however, has a more appropriate signification, in which we shall be compelled habitually to use it; and we will, therefore, in the present connection, use the former exclusively.

In general, the determination of a suit involves two classes of questions, which are distinguished as questions of law, and questions of fact. The latter depend for their determination upon the evidence; the former, upon general rules and principles, which in the aggregate constitute the law.

[1] "Jurisdiction is the power to hear and determine the subject in controversy between parties to a suit" (Rhode Island v. Mass., 12 Pet. 717); it has also been defined as "an authority or power which a man hath to do justice in causes of complaint brought before him." (Jacobs's Law Dict., "Jurisdiction.")

Questions of law are again of two kinds, viz., those which relate to jurisdiction, or other points of procedure; and those which relate to the merits of the controversy, or, as they are called, questions of right. The determination of questions of fact is part of the procedure in a case, and the subject of evidence, therefore, belongs to the law of civil procedure, the whole object of which is to elicit and present to a competent tribunal the question of right involved in the case.

The law of civil procedure may, therefore, be described as that branch of the law which provides for the creation of a jurisdiction, and which regulates the mode of procedure to be followed by the parties and the court in the conduct of the case (including the determination of all questions of fact), in order to elicit the questions of right involved; and which also regulates the subsequent proceedings necessary to carry the judgment of the court into effect.

In England, and in many of the States, the law of civil procedure is reduced to statutory form, and a competent knowledge of it can be obtained only by the study of the code of civil procedure of the State in which the student proposes to practice. It presents no great difficulty in its acquisition, and will, therefore, at this time, require no further remark.

The law of private right may be described as consisting of the aggregate of the rules and principles, whether statutory, customary, or of natural reason, by which the courts are, or are supposed to be, governed in determining the questions of right involved in civil cases or controversaries. This description, however, like our general definition of the law, though it may serve to direct and define the object and scope of our investigations, gives us no information as to the essential nature of the rules and principles which constitute the law of private right. We must, therefore, seek further for a definition; and, in doing this, we cannot do better than to pursue still the method originally marked out, namely, to observe and analyze the actual course of business in the courts.

PART I.

OF THE NATURE OF THE LAW OF PRIVATE RIGHT.

CHAPTER I.

ANALYTICAL OUTLINE OF THE LAW OF PRIVATE RIGHT.

§ 1. *Division of the Law of Private Right.*

IN every civil suit the immediate question to be determined by the court is whether the force of the Government shall be used in behalf of the plaintiff to compel some act or forbearance on the part of the defendant. This power of coercing another by means of the force of the State is called an action; and the immediate question in every controversy, therefore, is to determine whether the plaintiff has an action against the defendant, or otherwise. The nature of an action is simple and readily understood. It is thus defined by Bracton, following Justinian's *Institutes*: "*Actio nihil aliud est quam jus persequendi in judicio quod alicui debetur.*" But it is to be observed that the Latin *jus* has a somewhat wider signification than the English term *right*, and is used with propriety to denote actions or legal powers as well as rights; and, on account of this ambiguity, the definition of Heinnecius[1] is to be preferred, viz.: "*Actio non est jus sed medium jus persequendi.*"

An action, however, does not imply the actual power of coercion, nor does such actual power necessarily constitute an action. Thus should A have the property of B, which he refuses to return, or should he owe money to B, which he refuses to pay—in either case B would have an action against A, even though, in attempting to enforce it, he should be defeated by perjury or defective evidence, or by the ignorance or corruption of the judge; and this is true, whatever theory we adopt as to the nature of the law; for even if we should suppose the impracticable dreams of the codifiers to be realized, and the law to be composed altogether of laws, or statutory enactments, enumerating all possible injuries, and prescribing the corresponding actions, yet the most absolute power could not always render the remedy effectual. Whether an action exists, therefore, is to be determined in every case, not by the result of the particular suit, but by general principles applicable to all similar cases.

Of these principles the fundamental one is, that wherever there is a right there shall be an action; or, as it is expressed in a maxim common to our own and the Roman law, "*ubi jus ibi remedium*" (where

[1] Cited in Austin, Jur., 792.

there is a right there shall be a remedy); and the converse of the principle is also true, for all actions are in theory mere means of enforcing rights.

The law of private right, therefore, treats of two principal subjects —viz., rights and actions; and it is obvious that its nature can be understood only by understanding the nature of these two. For this purpose a classification of rights and of actions is necessary, and fortunately we have at hand the accurate and scientific classification of the Roman lawyers, which, though practically unknown to us, is universally recognized by other jurists.

§ 2. *Classification of Rights.*

Rights are of two kinds, differing essentially in their nature: namely, rights of ownership—such as the right which one has in his horse, land, or other property; and rights of obligation—such as the right to the payment of a debt or the performance of any other obligation. A right of the former class is generally called a right *in rem;* and a right of the latter, a right *in personam*, or *in personam certam;* that is to say, against a specific person.[1]

The most common and familiar of the rights *in rem*, or rights of ownership, is the right of property; and an analysis of this right will disclose to us the nature of this class of rights generally.

The propositions that one has a right to a horse or other thing; that it is his, or his own, or that it belongs to him, or is his property, are all equivalent expressions, and signify that the thing specified is, or rightly should be, appropriated to him; that it is (in the sense of the Latin *proprius*), proper or peculiar to him, and not common to others. The term "property," or "right of property," therefore, signifies rightful appropriation by the owner of the thing owned; and in it are implied the following propositions:

1. Actual appropriation is not sufficient to constitute the right, nor is it necessary to its existence; for a man may appropriate that which is another's, and the owner be thereby deprived of the enjoyment of his right;

2. The owner of the thing may, to the extent of his right, act freely with regard to the thing owned, according to the dictates of his own will; and

3. The power of free action with regard to the thing owned is taken

[1] "The terms *jus in rem* and *jus in personam* were devised by the civilians of the middle ages, or arose in times still more recent. I adopt them without hesitation, though at the risk of offending your ears; for of all the numerous terms by which the distinction is expressed, they denote it the most adequately and the least ambiguously." (Austin, Jur. 380.) "Rights *in rem* may be defined in the following manner: rights residing in persons and availing against other persons generally; or . . . answering to duties incumbent upon other persons generally. . . . The following definition will apply to personal rights: rights residing in persons, and availing exclusively against persons specifically determinate; or . . . answering to duties which are incumbent exclusively on persons specifically determinate." (*Id.* 381.) The term "exclusively" should be omitted. The terms "rights *in rem*" and "*in personam*" were derived from the names of the corresponding actions; and accordingly the former are defined by Thibaut as rights which can be enforced by an action *in rem*, and the latter as those enforced by an action *in personam*. (Lindley, Introd. to Jur. 57.) The classical Roman jurists divided rights into those of ownership (*dominium*), and those of obligation (*obligationes*), the latter term including not only obligations, but the corresponding rights. (Austin, Jur. 956.)

from the rest of the world, and a corresponding moral restraint or duty is imposed upon them.

All other rights *in rem* are of essentially the same nature as the right of property. Thus, a man's right in his own person consists in its being, like his horse or his land, appropriated (*proprius*) to himself, and free from the power or control of others. So also a husband's right in his wife, or a wife's right in her husband, or a parent's in a child, or *vice versa*, consists in the wife, husband, child, or parent, as the case may be, being, for certain purposes and to a certain extent, appropriated or exclusively devoted to the husband, wife, parent, or child, respectively, and free from the power, control, or interference of others.[1] These rights, therefore, to the extent indicated, are of the same essential nature, and in each case we may say of the object of the right, whether property, wife, husband, or child, that it belongs to the one having the right, or that it is his, or his own (*proprius*); or, in other words, that it is, or should be, appropriated or exclusively devoted to him.

An obligation is a duty owing from one person to another, the performance of which may be rightfully exacted by the obligee or person to whom it is owed. A mere duty, without such corresponding right to exact its performance, is not, properly speaking, an obligation. Thus there is an obligation on the part of a bailee to restore the property intrusted to him, and the bailor may rightfully exact the performance of this obligation; but there may be a duty upon the part of a man to perform a charitable act without any right upon the part of another to exact it, or obligation on his part to perform it.[2] The right to exact the performance of an obligation is called a right *in personam*.

Obligations and the corresponding rights *in personam* originate either from contract, or from delict, or from mere right (*ex mero jure*), without the intervention of contract or delict.[3]

[1] "Considered as the subject of the real right (right *in rem*) which resides in the child, the parent is placed in a position analogous to that of a thing. In short, whoever is the subject of a right which resides in another person, and which avails or obtains against a third person or persons, is placed in a position analogous to that of a thing, and might be styled (in respect to that analogy) a thing." (Austin, Jur. 398.)

[2] "The term 'obligation' has two senses: in its more extensive signification it is synonymous to duty, and comprises imperfect as well as perfect obligations. Those obligations are called imperfect for which we are accountable to God only, and of which no person has the right to require performance. Such are the duties of charity and gratitude. . . . The term 'obligation,' in a more proper and confined sense, comprises only perfect obligations, which are also called personal engagements, and which give the person with whom they are contracted a right to demand their performance. . . . Jurists define these obligations to be a jural tie which binds us to another, either to give him something, or to do, or to abstain from doing some act: *Vinculum juris quo necessitate adstringimur alicujus rei solvendæ, obligationum substantia consistit ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum.*" (Pothiur on Obligations, p. 1.) "By the classical jurist, 'obligation' is never employed in that large generic sense which it has acquired in subsequent times" (Austin, Jur. 956), *i. e.*, as synonymous with "duty."

[3] In the *Institutes*, obligations are divided into *obligationes ex contractu, ex maleficio, quasi ex contractu*, and *quasi ex maleficio*. (Just. Inst., 3, 14, 2); the last two together constituting the class of obligations *ex mero jure*. Gaius, however, divides them as in the text: "*Obligationes aut ex contractu nascuntur, aut ex maleficio, aut proprio quodam jure ex variis causarum figuris*" (Dig., 44, 7, 1, cited in 2 Austin, Jur. 1017)—the last being again subdivided into *obligationes quasi ex contractu* and *quasi ex maleficio*. In the common law, according to the most ordinary division, obligations are divided into those which arise from contract, and those which arise from

To the first class belong all obligations arising out of contracts or agreements; to the second, all obligations arising from invasions or violations of rights *in rem;* and, to the third, all other obligations.

The three propositions implied in the nature of a right *in rem* are equally true, *mutatis mutandis*, with reference to a right *in personam;* that is to say: 1. Actual power to enforce the obligation is not necessary, nor is actual power to compel another to do an act sufficient, to constitute a right; 2. The owner of the right has the liberty to exercise it or not, as he pleases; 3. There is a duty or moral restraint on all the rest of mankind not to interfere with the exercise of the right, or the performance of the obligation. But in the case of a right *in personam* there is an additional element, viz., an obligation or duty upon a specific person—namely, the obligor—toward the owner of the right. The characteristic distinction between a right *in rem* and a right *in personam*, therefore, is that in the former case the subject of the right is the thing owned, and in the latter it is an obligation due from another.

This distinction between rights *in rem* and rights *in personam*—or of *dominium* and *obligatio*—seems to correspond precisely with the distinction made by Aristotle between *distributive* and *corrective*, or (as it may, perhaps, be more properly called) *commutative*, justice; the former being that branch of justice which determines the distribution or relative appropriation of things, and also of persons, where the latter are the objects of ownership—as, for instance, where they are parties to the family relation; and the latter, that is, corrective or commutative justice, that which relates to obligations.[1]

§ 3. *Classification of Actions.*

It is only when a right is violated by a breach of the corresponding duty that force can be directly applied to effectuate it, and then only by the enforcement of the duty. We say directly, for it is obvious that rights may be indirectly enforced by the threat of punishment for their violation, or, in other words, by the criminal law; but this constitutes a branch of the public law (*jus publicum*), which for the present we are not engaged in discussing.

In the case of rights *in personam*, the corresponding duty is an obligation exactly commensurate with the right, and therefore such rights may be directly enforced. In the case of rights *in rem*, the only corresponding duty is the general negative duty resting upon all men not to interfere with the right; and this can be directly enforced only

tort (*ex contractu* and *ex delicto*)—obligations *ex mero jure* being called implied contracts, and classed under the first head.

[1] "But of the particular justice, and of the particular just which is according to it, one species is that which is concerned in the distribution of honor, or of wealth, or of any of those things which can possibly be distributed among the members of a political community; . . . the other is that which is corrective in transactions between man and man; and of this there are two divisions, for some transactions are voluntary and others involuntary. The voluntary are such as follows: selling, buying, lending, pledging transactions, borrowing, depositing of trusts, hiring; and they are so called because the origin of such transactions is voluntary. Of involuntary transactions some are secret, as theft, adultery, poisoning, pandering, enticing away slaves, assassination, false witness; others accompanied with violence, as assault, imprisonment, death, robbery, mutilation, evil speaking, contumelious language." (Ethics, Bk. 5, Ch. 3, pp. 8, 9.) "Voluntary" transactions correspond precisely to obligations *ex contractu;* "involuntary," to obligations *ex delicto* and *ex mero jure*.

when the right is violated or threatened; in which case there arises a specific duty in the particular person invading the right, or in other words, an obligation, and a corresponding right *in personam* in the person injured. Hence, rights *in rem* cannot be enforced directly, but only indirectly, either by the fear of punishment or by enforcing the rights *in personam* arising from their violation.[1] In certain cases of violation of rights *in rem*, the party injured may himself enforce the corresponding obligation—as, for instance, where this is necessary in defense of himself or property;[2] but in general the natural liberty which every man, in the absence of government, would have to enforce his right is, by the institution of government, taken from him and vested in the courts, and, in lieu of it, there is given him an action, or power of invoking the exercise of the force of the State to compel the performance of the obligation.

As we have observed, obligations are divided, according to a classification commonly received in our law, into obligations arising from contracts, express or implied, and obligations arising from torts; and a corresponding division is made of actions, viz., into actions *ex contractu* and *ex delicto*.

It is convenient, however, to divide obligations, considered with reference to actions, into those obligations which arise upon an actual or threatened invasion of a right *in rem* to restore the party injured to its free enjoyment, and obligations to transfer to the obligee money or other property belonging to the obligor. The obligation resting upon any one who has possession of the property of another to restore it, is an instance of the former class; an obligation to pay a debt or compensate for an injury, of the latter. The former may be called *vindicative*, the latter *commutative*, obligations; or, more properly, the corresponding rights *in personam* may be called respectively *vindicative* and *commutative*.

Actions to enforce the former class of obligations are called actions *in rem*, or real actions; those to enforce the latter, actions *in personam*, or personal actions.[3]

This division of actions was originally taken from the Roman lawyers, but is equally applicable to our own law, and must be adopted as at once the most convenient and the most scientific.

The terms used are, however, open to the objection that they seem

[1] Hence the duties corresponding to rights *in rem* are not, in the proper sense, obligations.

[2] 3 Blackstone, Com.: "Self-defense, that original right of man which, as Cicero says, is a law enacted by Nature itself, and which the Roman jurists were ingenuous enough to believe could not be ignored in any body of laws in the world. *Vim vi repellere omnes leges omniaque jura permittunt.*" (Ihering, Struggle for Law, 122.)

[3] This division of actions was adopted into our law at an early day, and will be found explained by Bracton, precisely as by the Roman lawyers. The true nature of the distinction was, however, afterward lost sight of, and real actions came to be considered as including only actions affecting real estate, and personal actions as including all others. (Stephen, Pleading,* 3.) Thus, detinue, which was an action for the recovery of the possession of personal property, though in reality a real action, was classed by the English lawyers as a personal action.

The old real actions, with one or two important exceptions, finally became obsolete, and were replaced by the action of ejectment; which was in form a personal action for trespass, but was made to serve also for recovering possession of the land. The meaning of the distinction thus became altogether lost to the profession, and the distinction itself faded out of the law. As the old forms of action are now generally abolished, there is no reason why we should not return to the more rational classification.

to imply that actions *in rem* have not for their object the enforcement of obligations, which is not the case. For such actions, as well as actions *in personam*, have for their immediate object the enforcement of rights *in personam*, or obligations; and the only difference is that, in the one case, the enforcement of the obligation is the ultimate as well as the immediate object of the action, while, in the other, the obligation is merely subsidiary, and the ultimate object is the vindication of the right *in rem* which has been invaded or threatened.[1]

It would be more appropriate, therefore, to term the two classes of actions *vindicative* and *commutative;* the former having for their ultimate object the vindication of rights *in rem* already existing in the obligee, and the latter the transfer to the obligee of a right *in rem* previously belonging to the obligor. The use of the terms "actions *in rem*" and "actions *in personam*" is, however, so familiar that it will be well to retain them.

Actions *in rem* may again be divided into *restitutive* and *preventive* actions; the former having for their object to restore the plaintiff to the enjoyment of a right *in rem* which has actually been invaded, and the latter to prevent a threatened invasion.

Actions *in personam* may be subdivided into actions *for the specific performance of contracts*, and *compensative* actions, or actions for damages; and the latter, again, into actions *ex contractu* and *ex delicto.*

The following examples will illustrate the nature of the different classes of actions, viz.: An action to recover real or personal property is a *restitutive action in rem;* an action to enjoin interference with the plaintiff's property is a *preventive action in rem;* an action to compel the performance of a contract to convey land is an *action in personam for specific performance;* an action for damages for breach of contract is a *compensative action in personam ex contractu;* and an action for damages for trespass on property or person is a *compensative action in personam ex delicto.*

§ 4. *Of the Subject-Matter of Private Right.*

The doctrine of rights and that of actions must necessarily constitute the principal divisions of the Law of Private Right; but there are involved in these terms certain notions which must be considered independently. These are signified by the terms, *persons*, *things*, and *events*, which in fact constitute the subject-matter with which the jurisprudence had to deal.

The term *things*, in its widest sense, would include persons, and also events. But in jurisprudence it is important to distinguish between events, or things that happen, and objects which exist, and of the latter to distinguish between human creatures and other things; and in ordinary language the terms are generally used with regard to these distinctions. By a person, therefore, is denoted simply a human creature; by a thing, any other existing object; and by an event, anything that may happen.

[1] "All rights of action must, it is evident, be founded on rights *in personam*—that is, on rights which avail exclusively against the determinate person or persons against whom the action will lie—although these persons may have been brought under that designation by committing an offense against a right *in rem*. Actions *in rem* are rights of action founded on an offense against a right *in rem*, and seeking the restitution of the party to the enjoyment of that very right, and not merely satisfaction for being deprived of it." (Austin, Jur. 389.)

There is necessarily implied in the idea of a right a person, or persons, in whom it is vested, or to whom it belongs, and who may therefore be called the owners of the right. There is, indeed, an apparent exception to this proposition in the case of corporations, or bodies politic, which are said to be fictitious persons, and in whom rights are said to be vested; but in reality, in all such cases, the rights reside, not in the so-called fictitious person, but in the persons composing the corporations; that is to say, in the officials of the corporation, in trust for the stockholders. The same proposition is also true of the State (the type of all corporations, or bodies politic), of which we habitually speak as being vested with rights, and subject to obligations. But in fact, the so-called rights of the government are vested in its officers, and are purely fiduciary in their nature, being held by them in trust for the people. The proposition, therefore, remains absolutely and universally true, that rights can be vested only in human creatures.

There is also implied in the idea of a right some person or thing in or over which it exists, and who or which may be called the subject of the right.[1] Thus, in the case of a right to property the subject of the right is the thing owned, and in the case of other rights of ownership—as, for instance, that of the parent in a child—it is the person in or over whom the right exists, who, considered as the subject of a right, occupies a position analogous to that of a thing. In the case of an obligation, the subject of the right is said to be the obligation; but in its ultimate analysis it is, in fact, the person owing the obligation.

There is also implied in the creation or initiation, and, therefore, in the existence, of any right the happening of some event in which it originated, and the same is also implied in every modification, and in the termination of every right. Or, in other words, every right originates in the happening of some event or series of events, and no right can be varied or terminated except by the same means.[2]

Thus the right of self-ownership, or property in one's person, originates upon the mere event of one's birth, is varied by the event of his reaching maturity, and terminates with his death. For this right, though at first restricted by the necessary conditions of infancy, is born with every human creature, and upon his reaching maturity becomes unrestricted, except by the necessary conditions imposed by the rights of others; and finally, at the end of his life, dies with him. The rights of parent and child originate with the birth of the child, concurring with other events, such as marriage, etc., and are varied by the event of the child's reaching maturity, and terminate by the death of either party. The rights of husband and wife originate in the event of marriage, and such rights are terminated by the death of either party, or by divorce. The original title to personal property may originate either in the event of its manufacture by the owner, or,

[1] The modern German jurists call the *owner* the subject, and the *subject* the object of the right; thus Mackeldey says (Compendium of Modern Civil Law, sec. 14): "In connection with every right we find a *subject* and an *object*. The subject of a right is the person on whom a right is conferred; the object of a right is the matter to which it relates." To this use of terms Mr. Austin very strenuously, and I think rightly, objects; and I profit by his views upon this point, as well as upon many others.

[2] I am indebted to M. Ortolan for the perception of this important fact, which, he observes, was overlooked by the Roman lawyers. I cite from memory, not having his work at hand.

in some cases, in the event of its mere appropriation. Derived titles may be acquired by conveyance from former owners, or by prescription, which is a series of events. The right to property terminates upon its destruction, or may terminate by abandonment. Rights arising from contracts, and also those arising from delicts, are illustrations of the same principle; the former originating in the execution of contracts, and the latter in the commission of injuries, and each terminating in satisfaction or release, or some other event.[1]

Persons, things, and events, therefore, constitute the subject-matter of private right, precisely as quantity, with its changes and relations, constitutes the subject-matter of mathematics.

The subject of persons presents itself in private right in two especially important aspects, viz.: First, with regard to the relative capacity of persons to acquire and enjoy rights, and to contract or be subject to obligations; and, secondly, with regard to the modifications of private rights in cases where there are more than one owner, and of obligations where there are more than one obligor.

In the latter aspect the subject belongs to the general subject of rights, and is most conveniently treated in connection with the subject of rights of ownership, or with obligations, as the case may be.

The former—which constitutes the subject of *status*—may, and indeed to some extent must, be treated in connection with the general subject of rights; but it is also convenient to consider the subject of *status* independently; with reference to which, however, it will be sufficient here to say that, in general, all men are considered equal in capacity for rights and obligations, and that, when any difference is made by the law, it is only for the protection of those whose capacity is affected—as, for instance, in the case of lunatics or persons of unsound mind, infants or minors, and *femes covert* or married women.

Things may be divided in innumerable ways, according to differences in them which are regarded. There are, however, certain divisions which are important from the stand-point of jurisprudence, and which accordingly have been adopted and more or less adequately explained by the jurists of our own or the Roman law; and to these we will briefly refer.

The first distinction to be referred to is that between those things which are susceptible of permanent appropriation and those which are not—as, for instance, air or running water; or, as the distinction is expressed in the Roman law, between *res in commercio* and *res extra commercium;* or, as it is otherwise expressed, "*quæ vel in nostro patrimonio, vel extra patrimonium nostrum habentur.*" But, as it is only with the latter that jurisprudence has to deal, it will be as well to leave the former out of view, and to use the term as denoting only such things as are susceptible of permanent appropriation; or, in other words, such as may be subjects of rights.

Using the term in this sense, there is included under it everything that may be the subject of a right, except persons; and, thus understood, *things* may be said to be either corporeal—that is, such as are

[1] The above remarks equally apply to actions; that is to say, every action must have an owner and also a subject, and no action can originate, terminate, or be in any way modified otherwise than by the happening of some event. It will be more convenient, however, to treat the subject with reference to rights only, leaving it to be understood that what is said will in general apply equally well to the case of actions.

perceptible to the senses—or incorporeal ; that is, such as the mind alone can perceive.

The most important instances of the latter class of things are those presented by patent-rights, copy-rights, franchises, and other monopolies, and also trade-marks ; and it is on account of these only that the distinction between corporeal and incorporeal things necessarily arises ; for, though the term "incorporeal things" is used both in our own and the Roman law to denote easements or servitudes and also obligations, these matters can be considered quite as well, and perhaps better, without regarding them as things. Thus a servitude or easement is nothing but a right in land, and the land is really the subject of the right ; and so, in the case of obligations, it is the person who owes the obligation that is really the subject of the right.

There are numerous other divisions of things, such as into things *movable* and *immovable* (or *lands* and *chattels*), *principal* and *accessory*, *fungible and infungible ;* and to these should be added the important distinction made in the Roman law between *single* and *collective* things —(*universitates rerum*), such as a flock of sheep, a stook of goods, etc.; the latter of which, though composed of corporeal things, are in reality ideal or incorporated, being regarded as continuing the same notwithstanding a change of the particular things composing them.

Every right, as we have observed, originates in the happening of some event or series of events, and a right can be varied or terminated only by the same means ; but there are many events that do not affect rights in any way ; and the converse of the proposition, therefore, is not true. Events by which rights are affected may be called juridical events, and it is with these alone that jurisprudence is concerned.

Juridical events are of two classes, viz.: acts or events occurring by human agency, and accidents, or events occurring without human agency.

An event of the latter class is quaintly called, in our law, "*Actus Dei ;*" and it is a maxim "*Actus Dei nemini facit injuriam.*"

The term *act* in its proper sense necessarily implies a volition, or act of the will ; and hence does not include what are improperly called *involuntary acts*—as, for instance, what a man does in his sleep, or in a state of total mental aberration.

It is also to be observed that, as to parties whose jural relations are being considered, the acts of third persons are in their effect the same as accidents ; and, as to such persons, may be called accidents. And hence the maxim, *Res inter alios acta alteri nocere non debet ;* which, though usually applied only to limit the effect of a judgment to parties and privies, yet rests upon the principle I have stated, and equally forbids in any other case that parties should be affected by the acts of strangers.

Acts are divided into transactions or acts which operate to transfer a right, or to create an obligation, as for instance a grant—and those things which do not ; as, for instance, the manufacture of goods, or the appropriation of unappropriated property ; which may be called, for lack of a better term, acts of original acquisition.

Transactions are either contracts (under which head we include grants and other executed contracts) or injuries, the latter including violations of contracts, and torts, or violations of rights of ownership.

Acts may also be divided into private acts, or acts of private

persons, and political acts or acts of the government; which latter are either *judicial* or *legislative;* the last being variously called Acts of the Legislature, or of Congress, or of Parliament—as the case may be—or Statutes.

The subject of legislative and judicial acts will be treated of at length in the third part of this work; to which also properly belongs the subjects of Torts and that of Contracts. But the last will require some observations here, in order that we may be in a position to understand the nature of the law of private right.

§ 5. *Definition of Contract, and its Place in the Law.*

A contract is defined by Blackstone to be "An agreement, upon sufficient consideration, to do or not to do a particular thing."[1] Other English and American authorities omit from the definition the element of consideration,[2] but otherwise follow Blackstone. All, with exception of Mr. Wharton, whose views will be again referred to, agree in defining contracts so as to include only *executory* contracts, or obligatory promises, excluding *executed* contracts, such as grants, sales, etc. But the latter are universally regarded as a species of contract, and the definition, therefore, cannot be accepted without giving to the term "contract" a narrower meaning than is justified by usage.

Another definition must, therefore, be sought that will include at once both classes of contracts; and this is, in fact, suggested by the class of contracts omitted from the common definition—*i. e.*, *executed* contracts. These obviously are mere agreements for the transfer of rights; and this, upon a little consideration, will appear to be equally true of *executory* contracts. For, as we have already observed, an obligation, in its ultimate analysis, gives rise to a right in, or over, the obligator himself; and hence, by an obligatory promise, or executory contract, there is, in fact, transferred to the promisee a power to control the action, or determine the conduct, of the promisor, which previously belonged to the latter. An executory contract, therefore, is, in its essential nature, the transfer by the promisor to another of a right in himself. For, in spite of our natural aversion to such a view of the case, all rights of obligation consist in a limited dominion over the obligor, which differs in degree only from the dominion a master has over his slave; and, looking to the bottom of the matter, the obligor is, to the extent of the obligation, the property of the obligee, precisely as land subject to an easement is, to the extent of the easement, the property of him in whom it is vested. And hence, according to a common and not improper usage, obligations are classed as a species of property; though this is euphemistically expressed by saying that the subject of ownership is the obligation, instead of the obligor.

All contracts, therefore, may be regarded merely as agreements for the transfer of rights; and as there is no other conception of contract which applies equally to executory and executed contracts, this must be accepted as the basis of the true definition.

Such agreement, however, is to be understood as referring, not (as is often supposed) to the secret wills or intentions of the parties, but

[1] 2 Com. 442.

[2] Sturgis v. Crowinshield, 1 Wheat. 197; Parsons, Cont. 6; N. Y. Civil Code, 744.

to their acts, or expressed volitions; for obviously it is the latter only that are to be regarded. Thus, if I promise, upon sufficient consideration, to pay to another a certain sum of money, but with no intention of doing so, a contract exists, notwithstanding the entire lack of will or intention on my part to perform it. So in the case put by Paley, when Temures proposed to the garrison of Sebastia that, if they would surrender, no blood should be shed, he in effect contracted to spare the lives of the garrison upon their surrender—such being the obvious meaning of his proposition, though at the time of making it he secretly intended to bury them alive, as he in fact did. It is, therefore, in the concurrence of assents, or expressed volitions, rather than the union of wills, that a contract consists.

Nor is it necessary that the expression of assent should be simultaneous, for in fact such simultaneousness is in many, if not in all, cases impossible. All that is required to constitute a contract is that, to an unrevoked subsisting expression of assent, there be a concurrence of the assent of the other party.[1]

A contract, therefore, may be defined as *an agreement or concurrence of parties in the expression of an assent to the transfer of a right from one of the parties to the other, or to a third party;* the term "party" being used (as it is commonly used in the law) to denote, not necessarily one person only, but two or more, when there are more than one contracting or contracted with.

Generally where one contract occurs there is also another, the one being the consideration of the other. Thus, where A agrees to perform labor for B, and the latter to pay him for it, there are two *executory* contracts, or promises; so, when A sells and conveys property to B, who gives him his note for it, there are two contracts, one *executed,* and one *executory;* and so when A conveys property to B, and B pays him for it in cash, or by conveying to him other property, there are two *executed* contracts; and in each of these cases the one contract constitutes the consideration of the other. And upon this fact Mr. Wharton bases his definition of a contract, which he defines as "an interchange by agreement of legal rights."[2] But, obviously, this definition excludes an important class of contracts—namely, gifts or gratuitous conveyances—in which there is only the one contract; namely, that of the donor to the donee.

Upon the same fact—that is, upon the general concurrence of contracts in pairs—is based also the division of contracts into unilateral and bilateral; but this distinction is clearly inadmissible. Every contract is in one sense bilateral—that is, it needs the concurrence of two parties to constitute it—but it is in all cases a mere single agreement for the transfer of a right; and, hence, what is usually called a bilateral contract is not a single contract, but two separate contracts; and it can only produce confusion to consider them as one.

[1] According to Kant, "a contract is effected only by the combined or united wills of both (parties), and consequently so far only as the will of both is declared at the same time or simultaneously." This, he justly remarks is, as a matter of fact, impossible; and hence arise difficulties which can be removed only by the "transcendental deduction of the conception of acquisition by contract" (Philosophy of Law, Hastie, 102)—a method which, I confess, I do not quite understand. A simpler solution is to reject the false assumption which gives rise to the difficulty, and to recognize the obvious fact that a contract consists, not in the concurrence of the secret volitions of the parties, but in the concurrence of their acts of assent; which need not, and, indeed, as Kant very conclusively shows, cannot be simultaneous.

[2] Wharton on Cont., sec. 1.

It is obvious, from our definition, that contracts are to be regarded as a mere means by which rights are transferred, and hence they belong to the general subject of juridical events.

In the case of an executed contract, the right transferred is a right of ownership, or *in rem;* in the case of an executory contract, a right of obligation, or *in personam.* The subject of contracts is, therefore, involved in the consideration of each of these classes of rights; and, in the former, to an even larger extent than in the latter. For nearly all rights of property originate in contract, and the law of property is, therefore, in the main but an application of the principles of contract.[1]

Rights of property, however, do not originate exclusively in contract, but may originate in other juridical events; and the same is true of obligations. Hence, neither the law of property nor that of obligations can be considered as a branch of the subject of contracts; nor can the subject of contracts be considered as belonging to either the subject of ownership or that of obligations; though the law of both of these subjects, as we have seen, consists to a large extent in the application of the principles of contract. Hence, contracts must be considered as belonging to the preliminary subject of juridical events; which, as constituting the only means by which rights can be originated, transferred, terminated, or in any way affected, must be considered before the detailed investigation of rights can be entered upon.

§ 6. *Of the Arrangement of the Law with a View to Its Exposition.*

It is obvious that rights may be considered, and for that purpose divided, according either to the persons to whom they belong, the subjects to which they relate, or the juridical events in which they originate; and in fact it is, for different purposes, necessary to use in turn each of these principles of division.

Thus, in order to segregate the subject of Private Right (*jus privatum*), and to treat it independently, it is convenient to distingush it from Public Right (*jus publicum*)—the former treating of the rights of individuals, the latter of those of the State, and the division, therefore, being obviously based upon a regard to the owners of rights, or persons in whom they are vested.

Again, with regard to private rights it is convenient for certain purposes to divide rights into two classes, according to the persons in whom they are vested, viz.: into rights vested in persons of normal *status* (*sui juris*), and those vested in persons under disability (*alieni juris*); and upon this distinction is based the division of the law into the *jus personarum* and *jus rerum*—terms singularly inappropriate, and which have given rise to much misapprehension and confusion.

Another and more important division of rights is according to their subjects, viz.: into rights of ownership and rights of obligation—the subjects of the former being things, or persons occupying a position analogous to things, and those of the latter being obligations.

Finally, rights may be divided, according to the events in which

[1] This has been remarked by Mr. Bingham, the only author I know who seems fully to have appreciated the fact: "Individual rights to land," he says, "depend upon the application of contracts, and can be sustained on no other foundation. It follows, therefore, that in all or most cases of dispute in regard to individual property in land, the questions that may arise are questions concerning contracts." (Law of Real Property, 10.)

they originate, into rights arising from contract, those arising from tort, etc.; and this, in fact, is the division we have adopted of rights *in personam*.

Nor would it be unprofitable to consider rights *in rem* from the same point of view, if for no other purpose than to perceive the important truth that the law of property, real and personal, including equity as well as law, and equitable as well as legal estates, is in the main but a mere application of the principles of contract.

In view of the different principles of division that may be followed, there is obviously room for much variety in the arrangement of the law for the purpose of its exposition, and accordingly different writers will vary in their treatment of the subject. But there seems to be a general concurrence among the best class of writers in the division we have adopted, viz.: into Public and Private Right (*jus publicum* and *jus privatum*), with subdivision of the latter into *Rights* and *Actions*, and of each of these into Rights or Actions *in rem* and *in personam*.

This (omitting the division into *jus personarum* and *jus rerum*, which was a mere contrivance for the purpose of making a place for the treatment of the subject of *status*, and may well be dispensed with) is substantially the arrangement of the *Institutes*, in which, omitting the *jus personarum*, the various subjects of the law are arranged under the three general heads of *Dominium*, *Obligationes*, and *Actiones*, the first two corresponding to rights *in rem* and *in personam*.

And this is, perhaps, to be preferred to the arrangement of the law of private right under the head of Rights and Actions, which we have adopted. For rights of ownership, rights of obligation, and actions are disparate subjects, and cannot be regarded as separate and independent parts of the law, but rather as each in itself constituting the law in a certain aspect. Thus the subject of ownership (including under that head all rights *in rem*) may be regarded as coextensive with, and therefore as in fact constituting, the law—obligations and actions being regarded merely as means of effectuating the principles of the law of ownership. Or the law may be regarded simply as the doctrine (including both the science and the art) of obligations, the subject of actions being regarded merely as the means of enforcing obligations, and the subject of rights of ownership (out of which, as we shall see, all obligations arise) as merely part of the doctrine of obligations. Or the law of private right may be regarded (as I propose in the following chapter to regard it) merely as the doctrine of actions, and the doctrine of rights, whether *in rem* or *in personam*, merely as a subsidiary part of the doctrine of actions.

Whichever arrangement be adopted, however, the exposition of rights *in rem* and *in personam* should be preceded by a general part, treating of the nature of rights, and of the method, first principles, and subject-matter of right; which subjects constitute the necessary prolegomena to the detailed exposition of rights. And in this part should be considered at length the subject of juridical events—in which alone rights originate, and by which alone they can be transferred, or in any way affected; and under this head especially the subject of contracts, and that of legislative and judicial acts; and in connection therewith the subject of Hermeneutics, or the art of interpreting language and other signs by which human intention is expressed.

To this part of the law especially belongs the subject of contracts, for which no other place can in fact be found. For the whole subject

of property, including both the legal and equitable doctrine, as well as that of obligation consists—as we have already observed—in fact almost entirely of a mere application of the principles of contract.[1]

CHAPTER II.

OF THE NATURE OF RIGHT, AND OF THE LAW OF PRIVATE RIGHT, AND THEIR RELATION TO EACH OTHER.

§ 1. *Division of the Subject.*

FROM what has been said, it is obvious that the Law of Private Right consists of, or rather embraces, two principal subjects, viz., the Science or Doctrine of Rights, and the Doctrine of Actions; and it will, therefore, be necessary for us to determine the nature of each of these and their relation to each other. The former, which may appropriately be termed *Right*, is simple in its nature, and, as will be seen, eminently susceptible of clear definition and accurate and scientific exposition. The latter is of a complex nature, being inextricably involved with the subject of rights, and hence is more difficult to explain. The former, therefore, must first be considered.

§ 2. *Of the Nature of Right.*

Right, as we have indicated, may be defined simply as the science or doctrine of rights; and, to understand fully its nature, it will be necessary for us to investigate the nature, and to determine the definition, of rights; and this will be done in a subsequent chapter. But, for our present purpose, it will be sufficient to call attention to one element only in the signification of the term "a Right," or "Rights," which is that, in its proper sense, and as universally used, it connotes and necessarily implies the quality of rightness. Thus, to say one has a right to property, is but another mode of saying that it is right for him to have it; or to say that he has a right to the payment of a debt, or to the performance of any other obligation, is only in effect to say that it is right for him to exact it.

Hence, the supposed distinction between legal and moral rights and between legal and moral justice, now so generally received, and which has had so much to do with the existing imperfect and confused state of legal thought, is inadmissible.

All rights are *moral* rights; and it is as much a contradiction in terms to speak of a right that is not a moral right as to speak of a square circle or a four-sided triangle. It is thus that the term is universally received, except by a small clique of jurists, who find it impossible to reconcile their theory with this obvious meaning of the term; and in this sense is the proposition to be understood when we

[1] This fact is obscured in the English law by the prevalent error, to which we have referred—from which Mr. Wharton is the only writer on contracts who is exempt—of defining contracts so as to include merely executory contracts—an error the more strange from the fact that it is not only in conflict with the decisions, but also with the practical view taken, in spite of their theory, by all writers on the subject of contracts.

say that it is the function of the State to protect and enforce rights or to administer justice, which is but the observance of rights, or the rendering to every man his right;[1] by which is meant nothing else than rights and justice in the familiar and proper sense of the term. It is thus, for instance, we use the term when we say, with Blackstone, that "the principal aim of society is to protect individuals in the enjoyment of these absolute rights which were vested in them by the immutable laws of Nature;" or when we say, with Cousin, "Government, in principle at least, is precisely what Pascal desired—justice armed with force;" and in this sense the terms are used, and the things noted by them guaranteed to us, in the Great Charter, the Bill of Rights, and other fundamental laws of English liberty, and in the Declaration of Independence, the Constitution of the United States, and the constitutions of the several States. For the State to give us under the name of justice anything but justice, or the protection of our rights as thus understood, would be to "palter with us in a double sense; to keep the word of promise to the ear, and break it to the hope."

To verify these remarks, we have only to glance over the several classes of rights which are, in fact, enforced by the States. When we speak of the right of personal liberty or self-ownership, or of the rights of a father in his child, or of a child to the protection and support of his father, or of the right to property, whether produced by the hand of the owner, or vested in him by the grant either of another individual or the State; or when we speak of the right to the return of property which one has deposited with another, or of which he has been wrongfully deprived, or of the right to the repayment of money loaned, or to compensation for an injury, or of the right to the performance of any other obligation—we speak of things not created by the will of the legislature, but by the principles of natural right as developed and established in the popular conscience, which rest not upon the arbitrary will of man, but upon that law which, as Coke says, "God, at the time of the creation of the nature of man, infused into his heart for his preservation and direction."[2] Hence, these rights do not differ essentially under different systems of law. They are not one thing in America, another in England and its colonies, and still another in the several countries of modern Europe; but they are everywhere substantially the same; and we may travel throughout the civilized world without finding them materially affected. And it is, in fact, in this general recognition and firm establishment of human rights that the superiority of modern European civilization essentially consists.

Rights, therefore, being not artificial creations, but natural phenomena, *the theory of rights must be a true science; and this science belongs at once to morality and to the law, and constitutes a province common to both. Nor does it vary essentially in its nature, whether viewed in the one aspect or the other.*

The proposition italicized constitutes what I conceive to be the distinctive principle of the true theory of jurisprudence. It rests, however, as we have seen, upon the proposition that the term, *a right, or*

[1] *Justitia est constans et perpetua voluntas jus suum cuique tribuere.* (*Inst.* 1, 1.) This is a definition of the virtue. Justice in the abstract consists in rendering to every man his right, or, in other words, in the observance of rights.

[2] Calvin's case, Rep. 12, 13.

rights, connotes or necessarily implies, the quality of rightness or moral rectitude—a notion extremely difficult to define, and with reference to which there are many conflicting theories. It would seem incumbent upon us, therefore, to determine here what is meant by the term *right*, when used in this sense, *i. e.*, as expressing a quality, or, in other words, to fix the meaning of the adjective *right*, and the test, or standard by which right and wrong are to be determined. This problem will be considered more fully in a subsequent chapter; but for the present it will be sufficient to remark that it is not in fact necessary for us to determine it, and that it will make no difference in our reasoning what theory as to the abstract nature of right may be adopted, provided only that the reality of moral distinctions, and the possibility of perceiving them be admitted—the former of which propositions is attested by the common consciousness, and the latter by the common experience, of mankind, and both are necessarily assumed in all theories of morality properly so called. We, therefore, do not attempt to define the term *right* otherwise than by saying that we use it in its ordinary acceptation, as denoting a universal and apparently necessary conception of human consciousness, leaving it to the reader to adopt a more specific definition, according to the theory he may prefer; as, for instance, that it consists in comformity to the will of God, or to Nature, or to universal order, or to the end or destiny of sentient beings, or to utility, or tendency to promote the happiness or welfare of mankind.

All that it is necessary for us to assume, I repeat, is the existence of moral distinctions. When this is admitted, all theories as to the nature of the law, if logically developed, must substantially agree. Hence all theories of jurisprudence may be classed in the one or the other of two categories, viz., those which admit, and those which deny, this proposition ; and to verify this remark, before proceeding directly with our subject, we will briefly refer to the several theories of jurisprudence now more or less extensively prevailing.

§ 3. *Of the Several Theories of Jurisprudence.*

The term "jurisprudence" may denote either the science of rights or that of the law, according to the sense in which we use the term *jus;* but it may be appropriately used to denote either, distinguishing the former by the term "theoretical," and the latter by the term "positive" or "practical jurisprudence."

The essential characteristic of the theory of jurisprudence here expounded is, that it asserts that the end of the law is the realization of rights, or the administration of justice, in the familiar and proper sense of those terms; and, hence, that the science of rights or of justice, in the same sense that it constitutes a department of morality, also necessarily constitutes a part of every system of law. Opposed to this is the theory of Austin, referred to in our introductory chapter, which has been generally accepted by English and American jurists, and which asserts that the law has nothing to do with rights or justice in the ordinary sense, or, as they are termed, *moral* rights and *moral* justice ; but that the rights with which it has to deal, and in fact the only rights which in a proper sense can be said to exist, are merely such legal powers or privileges as may be granted by the State, and therefore mere creatures of its will. The latter theory—resting

for its foundation, as it does, upon the notion that the law is merely legislation—may be appropriately termed the "legal," and the former—which regards the law as a means of realizing justice or of enforcing rights—the "*jural*" theory of jurisprudence. And we will accordingly, for convenience of reference, make use of these terms to distinguish the two theories.

Of the *legal* theory, assuming the correctness of its first principle, it may be said that it is in the main logical and consistent; and, as developed by Austin, it has at least served the purpose of showing by actual experiment the applicability of a strict logical method to the law. His exposition of it, indeed, stands unrivaled as an example of accurate and profound analysis and consistent and intrepid logic; and to this, doubtless, is to be ascribed the remarkable domination of his genius over the English mind, in morality and philosophy, as well as in jurisprudence—a domination unparalleled, except by that of Aristotle over ancient and mediæval thought generally. But the theory, when logically developed, is so in conflict with the actual character of existing law, and so subversive of human rights and liberty, and of the very foundations of justice and of morality generally, that Austin's own statement of it may be taken as a *reductio ad absurdum*.

Its general acceptance is to be accounted for by the difficulty of explaining the co-existence in the law of the rational or scientific element with the accidental and arbitrary, or, in other words, the historical element, of both of which, in spite of their apparent incongruity, the law undoubtedly consists. But upon an analysis of the law, this difficulty disappears, and it becomes easy to perceive how the two elements may, and in fact do, co-exist; and this will still more clearly appear when we come to investigate more particularly the method and principles of right, to which the third part of this work will be devoted.

The advocates of the jural theory may with propriety be termed the *jurists*; and this use of the term is justified by the fact that the theory has been generally received, and, in more or less explicit terms, asserted, by the jurists both of ancient and modern Europe, except those of England and America in the current century.

Modern jurists have indeed been divided into two schools, corresponding to the distinction between theoretical and positive morality, and called respectively the *philosophical* and the *historical* schools; but this division indicates rather a difference of method than of essential theory.

The historical school regards the law as consisting of the jural principles, or notions of right and justice, established in the manners and customs of the people, without seeking any further foundation for those principles than the fact that they are so established; or, in other words, they regard the law as resting upon custom. This conception is embodied in the old definition of the common law of England as consisting of the general customs of the realm;[1] and also in one of the definitions of the *jus gentium* of the Roman lawyers as being "the law or *jus* commonly observed by all men" (*jus gentium est quo gentes humanæ utuntur*). And this, indeed, is the primitive conception, not only of justice, but of morality generally, as is indicated by the etymology of that term, and also by that of the kindred terms "ethics," "*mores*," "δική," etc.

[1] 1 Blackstone, Com. *62, *67.

We find, however, universally accompanying the principles thus established, the conception of just and unjust. This is recognized by the historical as well as by the philosophical jurists; but they differ in this, viz.: that the former accept the received principles of right, or at least the more fundamental of them, as ultimate facts, while the latter hold they are in the main but expressions, more or less accurate, of necessary truths which are susceptible of scientific proof. In other words, the one asserts, and the other denies, or rather fails to recognize, the scientific nature of the principles of justice or right, and of morality generally.[1]

The historical theory corresponds precisely with the etymology of the term "*jus*," which is derived from *jur*, to bind,[2] and originally denoted merely the aggregate of the principles or rules regarded by the community as binding or compulsory on men in their dealings with each other. The philosophical theory corresponds with the later signification of the term, and to that of its derivative, *justitia*, and of its modern equivalents, right, *Recht*, *droit*, etc. And the difference between the two schools is, perhaps, precisely indicated by the advance from the primitive conception originally denoted by *jus* to the conception of right or justice as now commonly held.

The historical theory is, therefore, inadequate rather than false, and is in fact included in the philosophical; for in jurisprudence, as well as in morality generally, the practical standard to which rights are habitually referred, and by which they are in fact determined, is the general conscience, or, to use the Greek term, *νόμος*—or, in other words, the concurring moral convictions of the people; and both schools hold this to be the legitimate, and indeed only possible, practical standard. The philosophical jurists, however, while they accept received notions as the practical standard, go further, and hold that these notions should be subjected to the test of reason, in order that they may be either scientifically vindicated, or, if wrong, gradually corrected. We may, therefore, class the two schools together under the common appellation of jurists.

Accordingly, we find that the older jurists pass habitually and unconsciously from one school to the other. Thus, the old common lawyers, while they defined the law as consisting of general customs, also asserted that reason was the life of the law, and, indeed, that the law itself was nothing else but reason. So the Roman lawyers defined the *jus gentium* as the *jus* commonly observed by all peoples, and also as the *jus* which reason has established among all men. So also Aristotle defines the *νόμος κοινός*, or common law, as "the unwritten rules which appear to be recognized among all men," and also as "that which is conformable merely to the dictates of Nature."

§ 4. *Of Right as an Element of the Law.*

Whether considered as a branch of morality, or of the Law, Right, or the Science of Rights, is, of all branches of Moral and Political science, the most vitally important. For the term "rights" includes, in its signification, every claim which men can have to personal liberty

[1] This remark is, however, to be understood as applying only to the fundamental principles of *jus*; for otherwise both schools have treated the law scientifically, and the former—as, for instance, in the case of Savigny—with perhaps more success than the latter.

[2] Skeat, Etym. Dict.; Leverett, Lat. Lex.

or security—to the acquisition and use of property, to the existence and enjoyment of the family relations, and even to life itself; and the term "law" denotes, as the principal of the subjects included in its signification, the practical means by which, in each State, these vital claims are enforced or protected, and thus practically realized. The science of jurisprudence, therefore, deals with the very foundations of the social order—the necessary conditions of its very existence; and the problems presented by it are in fact the fundamental problems of all social and political philosophy.[1] Its importance, therefore, cannot be exaggerated; and, in view of the breaking up of old opinions and beliefs now going on, and the manifestly impending dissolution of many of the existing social and political institutions, it will not be extravagant to say that it presents itself to our modern civilization as the riddle of the Sphinx, which must be solved under the penalty of extinction.

It is, however, with Right as an element of the law that we are for the present concerned; and to this we will confine our attention. In this aspect, as we have said, it is of essentially the same nature as when considered as a department of morality; but—as is the case with all sciences considered with a view to their practical application—it is in some respects modified, and to some of these modifications we will briefly refer:

The most important of these modifications results from the fact that right, considered as a branch of morality, deals only with abstract cases, and is unembarrassed by questions of fact; but it is otherwise with the law, which has to deal at once with questions of right and questions of evidence. Such questions of evidence in general arise only in actual cases coming before the courts for adjudication, and the general principles of right in such cases are not affected; but often it is necessary to deal with cases by classes, and to determine in advance what evidence shall be required, or shall be sufficient, for the proof of certain classes of facts. Such provisions find their justification in the danger of perjury, and in the probability that to allow oral testimony as to such classes of facts would as often result in the violation of rights as in their vindication. Hence the necessity, or supposed necessity, of such legislation as the Statute of Frauds and Perjuries, and of such rules of law as that which makes a written instrument conclusive, and forbids the introduction of oral evidence to contradict or vary it; and of an analogous character are also such rules as that *simplex commendatio non nocet*, and others of a like sort. And, indeed, nearly all legislation designed to affect the determination of rights is of this kind. Hence, it is easy to see that the theory of right, when considered with reference to its practical application, must be profoundly modified by its implication with questions of evidence.

It must also be modified, and to a still greater degree, by the fact that the above and other rules for the practical application of the theory of rights must, from the nature of the case, be the result of

[1] To ignorance on this point are to be attributed the numerous schemes invented for the regeneration of the world—such as Socialism, Communism, Nationalization of land, Protection, and other forms of utilitarianism. In view of which, we may well say, with the peasant in Erckmann-Chatrian's tale: "*Mon Dieu, quand donc les hommes seront-ils justes?*" I do not include in my reference Nihilism, because in view of the evils suffered by mankind from governments, and political institutions, it is but an exaggeration of a very natural and proper feeling; or Anarchism, because I do not know but that it is the ideal toward which all political organization should tend.

human instrumentality, which is always and necessarily imperfect. Hence mistakes and blunders will be made, and, under the influence of custom and precedent, become stereotyped in the law. For, while all questions of right are essentially the same wherever and however they be considered, yet, with reference to the mode in which such rights shall be enforced—or, in other words, with reference to actions—there is room for infinite variety. And hence, in different systems, the forms of actions which, as we have said, constitute the formulæ in which the law for practical purposes is expressed, in fact differ greatly, and are more or less adequate or inadequate for the purpose for which they are designed, viz., the administration of justice. Thus, in our own and in the Roman law, the legal actions—which were the actions originally devised—proved altogether inadequate; and this in both systems gave rise to the equitable jurisdiction by which equitable actions were devised for the purpose of supplementing and correcting those existing at law. And so now, in England and generally in this country, all the old forms of actions are abolished, and the fundamental principle, *ubi jus ibi remedium*, allowed an almost unrestricted application. Still, however, the technicalities of the old system to some extent retain their influence, and we have added also many others of our own; and, hence, there still remains, and indeed to some extent there must always remain, a divergence of practice from theory.

§ 5. *Of Actionable and Non-Actionable, or Juridical and Non-Juridical Rights.*

From these causes it results that, while in theory actions should correspond precisely with rights, in practice they fail to do so, and thus many rights are without the corresponding remedy. Hence, in practical jurisprudence, we have the distinction, unknown to the theory of right, between actionable and non-actionable, or, as they are otherwise called, between juridical and non-juridical, rights[1]—a distinction in theory extremely important to observe, and with reference to practice no less so; for there is no fallacy more common and more pernicious in its consequences than to infer, from the non-existence of an action or remedy, the non-existence of the right. It was said, indeed, by Chief-Justice Holt,[2] that a right without a remedy is a vain thing; and, in the connection in which it was said, the remark was true, and embodied a principle which may be called the *vis medicatrix* of the law, namely, that no right shall be suffered to be without a remedy, or, in the words of the maxim, *ubi jus ibi remedium;* for it is the recognition of non-actionable rights, and of the necessity of providing remedies for them, which in the past has produced and governed the development of the law, and which is no less essential to its future development, whether that is to take place in the main spontaneously, as heretofore, or to a larger extent by legislation. But, under the influence of prevailing theories, this maxim has been perverted, and it is now the prevailing notion that where there is no remedy there is no right; or, as it is otherwise expressed, that the actual power of enforcement is an essential element of a right.[3]

[1] Kaufman's Mackeldey, Int. 1, 1, 12. [2] 2 Ld. Raym. 957.

[3] Holland (Jur. 62, cited *infra*, p. 61): "Every right is, as such, accompanied by a power of compelling the performance of, or forbearance from, some positive act. In the absence of such a power, no right, properly speaking, is conceivable." (Thibault: Lindley's trans., § 59.)

The contrary, however, is not only an obvious and necessary deduction from the very notion of a right, but is very clearly recognized in our law. Thus, it is a well-settled principle that a right barred by the statute of limitations continues to exist, though the remedy be forever gone.[1] So, also, it has been repeatedly held with reference to contracts declared void by the usury and banking acts, and with reference to conveyances of married women declared void by statute on account of defective acknowledgments, and with reference to marriages technically void for want of compliance with statutory provisions as to the mode of solemnization, that rights existed under and by virtue of such contracts, conveyances, and marriages, though expressly declared to be void by statute; and, accordingly, subsequent statutes declaring them valid have been upheld on the ground that the validating acts did not create new rights, but simply provided remedies for rights already existing.[2] Otherwise such laws would be clearly unconstitutional; for, on the theory that there were no pre-existing rights, they would operate to transfer the property of one set of persons to another, which is forbidden by all the American Constitutions, State and Federal.[3]

The nature of rights, therefore, is not affected by the imperfections and defects of the methods provided for carrying them into effect; nor is the science of rights, considered as a part of the law, in anywise different in its essential nature from the science of rights as a branch of pure morality.

§ 6. *Definition of the Law.*

In the beginning of our investigations, we defined the law of private right as consisting of the aggregate of the rules and principles by which the courts are governed, or are supposed to be governed, in the determination of questions of right presented to them for decision. In all cases, however, as we have observed, the immediate question before the court is simply to determine whether the plaintiff has an action against the defendant. It is only with actions, therefore, that the courts can deal directly; with rights they can deal only indirectly through the medium of actions. Hence, the rules and principles by which actions are determined are, as we have said, the formulæ by which the law of private right is expressed for the purpose of its practical application, and the subject of actions is, therefore, obviously co-extensive with the law of private right, and in fact constitutes that law in its practical aspect. The law of private right may, therefore, be defined without impropriety simply as the doctrine or (using the term "science" in a loose sense) the science of actions; for this is but another form of our original definition.

And this enables us to understand the one element of truth contained in the theory of Austin and the later English jurists. According to that theory, the law consists of mere legal powers, or, as they are erroneously termed, legal rights; or, in other words, of powers or so-called rights, created or at least recognized by the State, either through its legislative or its judicial department. And so, in one

[1] Sichel v. Carillo, 42 Cal. 493.

[2] Syracuse Bank v. Davis, 16 Barb. 103; Dentzel v. Waldie, 30 Cal. 144; Goshen v. Stonington, 4 Conn. 309.

[3] The existence of non-actionable rights is also very fully recognized, and many important consequences deduced from it, in the Roman, and in the modern Civil Law. (Savigny on Obligations, Brown's Abridgment, sections 5–11.)

sense, it does; and if, instead of calling such powers rights, we call them actions, the theory may be accepted, at least so far as to admit that practically, at any given time, the law of private right consists merely of the actions which are recognized and enforced by the courts.

But the fundamental error of the theory is that it ignores the existence of rights in any proper sense of the term, and regards the law as consisting only of mere arbitrary regulations, which is altogether a false view of the case; for, in every system of law, the rights which are established in the general conscience, or concurring moral convictions of the people, and which are generally recognized in the community, are recognized by the law, and actions are regarded merely as the means of effectuating such rights. And neither in our law nor in any other has the State ever attempted, except in certain well-defined cases hereinafter to be referred to, to create or essentially to modify rights.

It is, indeed, conceivable—though not in fact possible—that actions might be prescribed by law or legislation for every given state of facts, without any reference to rights, and jurisdiction in all other cases denied to the courts; but this in fact has never been attempted. But the theory of the law has always been—as expressed in the maxim *ubi jus ibi remedium*—that actions shall be allowed in all cases where rights exist; and the recognized function of the judges has consisted in finding appropriate remedies for such rights. In the exercise of this function the courts have, at different periods, in different degrees, been controlled or influenced by rules established by precedent and, in lesser degree, by statutory regulations; but in theory, and mainly in fact, their recognized function, as expressed in the old commissions, "*facturi quod ad justitiäm pertinet secundum legem et consuetudinem Angliæ*," has been to administer justice or to protect and enforce rights.[1]

Hence Right, or the science of Rights, is necessarily a part of the law of Private Right; and though, to the practical lawyer, whose aim is simply to know the law as administered, it is merely subsidiary, yet, in one sense, it is the principal part of it, for the protection of rights is the end and *raison d'être* of the law.

§ 7. *Historical Verification of the Jural Theory.*

The theory propounded in this chapter has been derived from a careful analysis of the law, from which it seems obviously and necessarily to follow. It may be added that it is also the theory upon which the actual development of the law invariably proceeds, and upon which alone that development can be explained. This will be found to be fully verified by the history of our own law, to which the second part of this work will be devoted; and it is equally true with reference to the Roman law, which divides with our own the dominion of the civilized world.

Every system of law begins with the mere establishment of a jurisdiction, or power to administer justice in cases actually presented for decision; and at this period of its history—outside of the laws or institutions by which such jurisdiction is established—there is in fact no law other than right or justice, as established in the common conscience.[1] Jurisdiction, then, at least at this period, is precisely what

[1] "Et quidem initio civitatis nostræ populus sine lege certa, sine jure certo primum agere instituit omniaque manu a regibus gubernabantur. Exactis deiude regibus

its etymology indicates—the power of declaring the right, or administering justice in actual cases presented ; or, as it has been defined, it is "an authority or power which a man hath to do justice in cases of complaint brought before him." [1]

From this condition, the law is in the main developed by the courts in the exercise of their jurisdiction, or, in other words, in the actual administration of justice ; and every step in its development has consisted not in the exercise of legislative power, but merely in the exercise of the judgment of the court upon the question of right presented to it for decision. Hence it follows that the law—except to the limited extent to which it has been affected by statutory provisions—is in fact but an attempted application of the principles of justice or right (in the words of Magna Charta, *justitia vel rectum*), to the jural relations of mankind ; and it follows also that, precisely to the extent to which the functions of the courts have been well performed (as in the main they have been), the law of private right is in fact identical with right or justice.

In the exercise of jurisdiction, two functions devolve upon the judge, viz.: (1) That of determining whether there is an obligation upon the defendant to the plaintiff, and a corresponding right in the latter ; and (2) That of applying the appropriate action to enforce the right, or—if his jurisdiction admits of it—that of devising such an action if it does not already exist. The former question is in all cases purely a scientific one—demanding only, for its decision, the exercise of the cultivated reason and judgment of the judge. In making his decision he is assisted by the opinions of other judges and jurists who have investigated the same or analogous questions, and his own decision is again considered and criticised by others. Thus the theory of rights has been developed by a strictly scientific process, more or less perfectly applied, and (so far as the doctrine of rights is concerned) it is in fact, except where errors have occurred, a mere development of the principles of natural right universally recognized in all systems of law. And though this development has been obstructed, especially in our own law, by a lack of philosophical knowledge and of logical consistency and scientific method, yet on the whole it has gone on with reasonable and ever-increasing consistency ; and even where it has erred, its errors have been quickly made apparent, and generally corrected, by the necessity of testing the deductions arrived at by applying them to actual practice, or have been ultimately eradicated by the establishment of some inconsistent principle. Hence, in every system of law, the theory of rights at all times more or less perfectly represents the notions of justice prevailing among the people, and is, as it were, a mirror reflecting the general conscience. And by this fact alone is the maxim to be justified, that every one is presumed to know the law ; for it is in the main written in his conscience, and otherwise the maxim would be unreasonable and absurd. Hence, the doctrine of rights, in the main without legislation, and often in spite of it, has in all civilized countries advanced hand in hand with civilization, and has become, like the water we drink, though, as it were, tinctured by locality, essentially the same throughout the civilized world.

lege tribunitia omnes leges hæ exoleverunt iterumque cœpit populus Romanus incerto magis jure et consuetudine uti quam per latam legem." (Dig. 1, 2, 2, §§ 1, 2.)

[1] Jacobs's Law Dict., "Jurisdiction."

Nor does the fact that principles of natural right are confirmed by statute, or consecrated by judicial usage and observance, in any way alter their essential nature; for it is the function of the State to provide for the administration of justice, and all law, however formulated, is therefore, in theory, an attempted expression or application of natural right; and hence, just so far as it answers the end of its existence—which in all civilized countries it very fairly does—it is, except so far as it provides for matters jurally indifferent, in fact natural right.

Thus the principle that one has a right to the return of his property which he has intrusted to another, or of which he has been unjustly deprived by another, is a principle of natural justice logically deducible from the principle of property, which is also a principle of the same kind ; and neither is the less a principle of natural right because it has been generally recognized and enforced in all political communities. Nor does a principle of natural right cease to be such even though its observance be enjoined by a statute. Thus the principles of personal liberty and security and of property still continue to be principles of natural right, although the provisions of Magna Charta, and also of all the American Constitutions, expressly enjoin their observance and forbid their violation. So, also, the principle of the obligation of contracts is not less a principle of natural right in America than elsewhere, although the Federal Constitution expressly forbids the enactment of any law impairing their obligation.

Hence the Roman law, like our own, is, as Celsus says of it, "a true philosophy," or "body of reasoned truth,"[1] differing from justice, as popularly received, simply in being a more scientific, and therefore a truer, expression of natural right.

And this explains and justifies the parallel between the Roman lawyers and Greek geometers drawn by Leibnitz, who was conversant at once with philosophy and the law, and of whom, it is justly remarked by Dugald Stewart, that "few writers, certainly, have been so fully qualified as he was to pronounce on the characteristical merits of both."

"I have," says Leibnitz, "often said that, after the writings of the geometricians, there exists nothing which, in point of strength, subtility, and depth can be compared to the works of the Roman lawyers ; and, as it would be scarcely possible from intrinsic evidence to distinguish a demonstration of Euclid trom one of Archimedes or Apollonius [the style of each of them appearing no less uniform than if Reason herself were speaking through her organs], so also the Roman lawyers all resemble each other, like twin brothers, insomuch, from the style alone of any particular opinion or argument, hardly any conjecture could be formed about its author ; nor are the traces of a refined and deeply meditated system of natural jurisprudence anywhere to be found more visible or in greater abundance. And even in those cases where its principles are departed from in compliance with language consecrated by technical forms, or in consequence of new statutes or of ancient traditions, the conclusions which the assumed hypothesis renders it necessary to incorporate with the eternal dictates of right reason are deduced with a soundness of logic and with an ingenuity that excites admiration. Nor are these deviations from the law of Nature so frequent as is commonly supposed."[2]

[1] "Philosophy is, or aims at becoming, reasoned truth." (1 Grote's Plato, vii.)

[2] To which may be added the following just and eloquent expressions of Cousin: "Universal and absolute law is natural justice, which cannot be written, but speaks

Hence, as we have seen, the law was defined by the Roman jurists and by our own Bracton as the science of the just and the unjust (*justi atque injusti scientia*), or, regarded in its practical application, as "the art of the good and the equal" (*ars boni et æqui*); "of which," says Bracton, following Celsus, "some one deservedly calls us the priests, for we conduct the cult of justice, and administer the principles of sacred right." To the same effect, also, is the definition of Leibnitz, "who defines jurisprudence to be the science of right (*scientia juris*) on some case or fact being proposed;"[1] or, in his own language, as "the science of actions in so far as they may be termed just and unjust;"[2] and of Suarez, who defines it as being "nothing more than a certain application of moral philosophy to regulate and govern the political morals of the State";[3] and with these definitions agrees Coke's proposition, that the Common Law is the "perfection of reason," or "nothing else but reason."

It is thus that the law has in fact always been habitually regarded by the jurists of the Roman law, and by our own until lately; and in view of the very nature of the conception of rights, as established in the most profound moral convictions of civilized peoples, and as embodied in all the fundamental laws of the English race, it is obvious that the law, which is but the expression, and attempted realization, of rights, cannot in theory be otherwise regarded. It is obvious also in view of the substantial identity of rights in the different States of the Union—each with its own independent system of law—and in England and its numerous colonies, and in all the independent states of Western Europe, that the part of the law in which rights are expressed, or, in other words, the substantive part of the law, is essentially identical in all civilized countries. So that thus far the noble dream of Cicero is realized: "*Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omnia tempora una eademque lex obtinebit.*" For the law, by which rights are ascertained and determined, is no other than "right reason"; which "is itself a law, congenial to the feelings of Nature, diffused among all men, uniform, eternal; nor does it speak one language at Rome and another at Athens, varying from place to place, or from time to time; it addresses itself to all nations and to all ages, deriving its authority from the common Sovereign of the universe"; and this is the law of which Brougham speaks, when he says, it is "a law above all the enactments of human codes;

to the reason and heart of all. Written laws are the formulas wherein it is sought to express, with the least possible imperfection, what natural justice requires in such and such circumstances. . . . Positive right rests wholly on natural right, which at once serves as its foundation, measure, and limit. The supreme law of every positive law is that it be not opposed to natural law; no law can impose on us a false duty, nor deprive us of a true light." (Cousin: "The True, the Beautiful, and the Good," Lect. 15.) Nevertheless, although laws have no other virtue than that of declaring what exists before them, we often found on them right and justice, to the great detriment of justice itself, and the sentiment of right. Time and habit despoils reason of its natural rights, in order to transfer them to the law. What then happens? We either obey it, even when unjust, which is not a very great evil, but we do not think of reforming it little by little, having no superior principle that enables us to judge it; or we continually change it, in an invincible impotence of founding anything, by not knowing the immutable basis on which written law must rest. In either case, all progress is impossible, because the laws are not related to their true principle, which is reason, conscience, sovereign and absolute justice.

[1] Heron, Jur. 521.

[2] *Id.* 523.

[3] *Id.* 306.

the same throughout the world; the same in all times. It is a law written by the finger of God upon the heart of man." [1]

In no other way can be explained the history of the adoption of the Roman law by modern Europe, and its subsequent influence upon jurisprudence and morality, and upon civilization generally. We are wont to speak of the *renaissance* of literature following the fall of Constantinople in the latter half of the fifteenth century, as the *renaissance par excellence;* but, if we have regard to the most vital elements of civilization, the true *renaissance* of European civilization must be dated back to the early part of the twelfth century, when Irnerius, an obscure professor of an obscure school at Bologna, rediscovered the Roman law for the modern world, and delivered his lectures on the *Corpus Juris Civilis*, as collected by Justinian. The eagerness with which there flocked to him, and to his successors, students from every part of Europe, numbering before the close of the century more than ten thousand, and, within a short period afterward, twenty thousand, the rapid diffusion of the new learning by its enthusiastic disciples, its introduction into the universities everywhere, or rather the creation of universities for imparting it, the general reception of the Roman law as the common law of the civilized world, and its subsequent effect in developing scientific jurisprudence, of which it forms the basis, and international law, which is but an application of its principles, cannot be accounted for in any other way than by the recognition of the fact that the Roman law is, as Leibnitz says, "a refined and deeply meditated system of natural jurisprudence;" or, as it is often called, "written reason."

[1] Heron, Jur. 148, 289.

PART II.

OF THE LAW OF PRIVATE RIGHT AS HISTORICALLY DEVELOPED.

CHAPTER I.

OF THE HISTORICAL DEVELOPMENT OF JURISDICTION.

§ 1. *Of the Development of the Jurisdiction of the Courts of Law.*

THE English law—which, in modified form, constitutes the common law of all the States of the American Union, except Louisiana—was, in the main, developed in the practical administration of justice by four courts, which existed in England from an early period until they were abolished by the late Judicature Act, and which were known as the Courts of King's Bench, Common Pleas, Exchequer, and Chancery.

Of these courts, the first three were vested with substantially the same jurisdiction over civil cases, and were known as the Courts of Law; the last, the jurisdiction of which differed materially from that of the others, both in its origin and nature, was called the Court of Equity. From this it resulted that the English law is composed of two distinct and independent systems of jurisprudence, which were developed respectively by the Courts of Law and the Court of Equity, and which are known as Law and Equity. Hence, to understand the nature of this development, some account must be given of the origin and growth of these two jurisdictions; and of these, the former being first in order of time, will first receive our attention.

In Saxon times, justice was ordinarily administered by the county court and other local courts, and these continued by sufferance to exist and to exercise a certain jurisdiction for some time after the Conquest. But the jurisdiction of these courts soon became practically obsolete, and may, therefore, be left entirely out of account in considering the development of the law.

It may, therefore, be stated, without error, that upon the Conquest all jurisdiction vested in the King, and was exercised by him, either in person, with or without the advice of his council, or by special delegation to such officers or judges as he might choose to designate.

At this period (with the exception of the county and other local courts—whose jurisdiction, as we have said, soon became obsolete) there were no regular courts or tribunals other than the King himself, who in fact, therefore, exercised an absolute and supreme control over

the administration of justice.[1] Hence all suits or applications for justice were made, in the first place, directly to the King, and considered by him, or by his Chancellor, or the Keeper of his Seal, who was the ministerial officer specially charged, among other duties, with assisting and advising the King in the exercise of jurisdiction, and who, on that account, was said to be the keeper of the King's conscience. Thereupon, it was the function of the Chancellor to determine whether the case was one calling for the intervention of the King; or, in other words, whether, assuming the facts alleged to be true, the plaintiff was entitled to his action, and, in the ordinary course of business, upon the determination of this question in the affirmative, a writ was issued, called the original writ, which was in the form of a precept or mandate from the King, under the great seal, addressed to the sheriff of the county in which the cause of action arose, or where the defendant resided, commanding him to appear before some designated officer or judge, or before the King himself, or King's Court (*Curia Regis*), at a certain day to answer the complaint.[2] Whether the case should be decided by the King or King's Court, or by some officer specially delegated, depended upon the nature of the mandate, or, in other words, upon the will of the King.[3]

In the latter case, in the earlier periods following the Conquest, there seems to have been no fixed rule as to the class of officers to whom cases were referred. In some cases the sheriff, the ordinary presiding officer of the county court, or some other judge especially appointed to preside over it, was designated; in others, the writ was returnable to itinerant justices, commissioned from time to time by the King, to hold independent courts; and in the reign of Henry III. the latter became a permanent institution under the name of "Justices in Eyre,"[4] but were afterward discontinued.

In the mean time, the King himself was accustomed to exercise a general and constantly increasing jurisdiction in his own court, called the "*Aula*," or "*Curia Regis*;" and ultimately, upon the discontinuance of the justices in eyre—the jurisdiction of the local courts having in the mean time become obsolete—the general administration of justice throughout the realm became vested in it, and it "became the ordinary tribunal for the administration of justice in all questions arising between subjects."[5]

It is difficult to ascertain from the current histories of the law the precise nature of the original constitution of this court; but, according to the common account, it seems to have consisted, in the latter part of the Conqueror's reign, of the King himself, the Grand Justiciary, the Chancellor, and the other great officers of the palace, "with whom were associated certain persons called 'justices' or '*justitiarii*,' to the number of five or six, on whom, with the Grand Justiciary, the burden of judicature principally fell."[6] It seems, also, that the great persons who held *in capite* of the crown—or, in other words, the bishops, earls, and barons—when summoned, were members of this court, which, however, was then called the *commune concilium regni*, or parliament.[7] But, ordinarily, the court consisted merely of the

[1] 1 Spence, Eq. Jur. 101, 120; 1 Blackstone, Com. 266, 267; 2 *id.* 24–31.
[2] 1 Spence, Eq. Jur. 226, 238, 239; 2 Blackstone, Com. 273.
[3] *Id.* 111.
[4] *Id.* 101, 115. [5] *Id.* 284.
[6] 1 Reeves, Hist. Com. L. (Finlayson's ed.), 264, 266.
[7] 1 Bac. Abr., tit. Courts, A; 1 Spence, Eq. Jur. 102, 106, 107, 119, and note.

great officers of the palace and the associated justices, and was presided over by the King himself, or, in his absence, by the grand justiciary.[1] It was the function of this court originally to advise the King, not only as to judicial proceedings, but also as to affairs of state and matters of legislation;[2] but in the reign of Henry III. the judicial business of the court was finally separated from the legislative, and "the *Curia Regis*, for the dispatch of judicial business, was created or finally established."[3]

From this court the common-law courts ultimately established were derived in the following order: The first division of jurisdiction took place in the reign of the Conqueror, when a separate division or branch of the court was established, especially charged with matters of revenue, which was called the Court of Exchequer.[4] This court was composed of the same members as the ordinary court, and seems to have been "very little else than the *Curia Regis* sitting in another place—namely, *ad scaccarium*—only it happened that the justices, when they sat at the exchequer, were called barons;"[5] or, as it is expressed by another writer, "as they sat in the hall, they were a court criminal, and, when up-stairs, a court of revenue; civil pleas they heard in either court."[6]

A further division of jurisdiction took place in the reign of John, resulting from the provision of Magna Charta that common pleas should no longer follow the King; and, "from this time, chief and other justices were appointed expressly to hear and determine pleas of land and injuries merely civil, which were known as common pleas; and that branch of the King's Court was held at Westminster. This is the origin of the Court of Common Pleas."[7]

The court still held before the King, from which the Court of Common Pleas and of Exchequer had been separated, was afterward called the Court of King's Bench.

In this way the King's Court was divided into the three courts referred to—namely, the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer—which in the reign of Edward I. were finally established, and their jurisdiction settled, as they afterward continued to exist until abolished by the Judicature Act; and, as thus established, each court consisted of one chief and three puisne judges—those of the Exchequer, however, being called barons. Of these courts as originally organized the Court of Common Pleas was the regular court for the transaction of civil business, and had exclusive, or almost exclusive, jurisdiction of civil cases between man and man. The Court of King's Bench had jurisdiction of all criminal matters, and also of all civil suits relating to its officers, and of all personal actions where the defendant was already in the custody of the court. The Court of Exchequer had jurisdiction of all suits for the collection of the revenue, and also of all suits by tenants and

[1] 1 Reeves, Hist. Com. L. (Finlayson's ed.), 264.
[2] 1 Bac. Abr., tit. Courts, A; 1 Spence, Eq. Jur. 103.
[3] *Id.* 107.
[4] 1 Spence, Eq. Jur. 102.
[5] 1 Reeves, Hist. Com. L. (Finlayson's ed.), 269.
[6] 1 Bac. Abr., "Courts," A. It is called the exchequer (*scaccarium*), from the checked cloth resembling a chess-board, which covers the table there, on which, when certain King's accounts are made up, the sums are marked and scored with counters (Jacobs's Law Dict., "Exchequer;" which suggests a fact, well to be remembered, that this was a period antedating the introduction of the Arabic numerals.
[7] 1 Spence, Eq. Jur. 103, 104.

debtors of the King. But the two courts last mentioned subsequently acquired substantially a concurrent jurisdiction of civil cases.[1]

Having thus given an account of the establishment of the common-law jurisdiction—the instrument by which the law, as distinguished from equity, was developed—let us now briefly review the development of the law itself from the beginning of the Norman rule down to the period at which the jurisdiction of these courts was finally settled in the early part of the reign of Edward I.

Upon the accession of the Conqueror to the throne of England, there was no formal abrogation of the old Saxon law; but, with some modifications hereafter to be adverted to, the law continued to be the same for some time after the Conquest as before. The positive institutions, or *jus civile* of the Anglo-Saxons, however—like that of all rude societies—related almost exclusively to the political and the criminal law, and hardly touched at all upon matters of private right.[2]

Nor did even the few and meagre provisions as to private rights, which did exist, long survive the Conquest; for the King's courts—by which, as we have seen, the old local courts were supplanted—were presided over by Norman judges, who were in general ignorant of the laws and customs of the Saxons, and hence it naturally resulted that the Saxon law soon became obsolete, along with the courts that administered it.[3]

It must, therefore, be assumed, as a fact beyond controversy, that the origin of the English common law—by which is here meant the *jus civile*, or that part of the law peculiar to the system—is to be sought in the period subsequent to the Conquest. Nor is it difficult to trace the general course, or to understand the precise nature of its development.

In the beginning of the Norman rule there was, as we have seen, no developed system of law in England; nor, indeed, with the exception

[1] 1 *Id.* 114, 115. The acquisition of this jurisdiction by the King's Bench was based upon the fiction that the defendant was in the custody of the court. Hence the form of the declaration in that court always contained the allegation that the defendant was in such custody, which the court did not permit to be disputed. That of the exchequer was based upon the fiction that the plaintiff was a debtor, or tenant of the King, and that the defendant, being indebted to him, he was thereby (*quo minus*) rendered less able to pay the King; hence the writ by which jurisdiction was acquired was called, from these words of the writ, the writ of *quo minus* (see Blackstone, *passim*).

[2] "The rules of legal decision among a rude people," says Mr. Hallam, "are always very simple, not serving much to guide, still less to control, the feelings of natural equity. Such were those that prevailed among the Anglo-Saxons; . . . minute to an excess in apportioning punishments, but sparing and indefinite in treating of civil rights." (Hallam, Middle Ages, 347, 348; 1 Spence, Equity Jur. 86, 282.)

[3] This, indeed, is at variance with the theory commonly prevailing with the English lawyers, who have always asserted that the English common law is of Saxon origin. (1 Blackstone, Com. 411, 412.) But, however true this opinion may be with reference to constitutional law—which, doubtless, had its germs in the rude but free institutions of our Saxon ancestors—all competent authorities now agree that, with reference to private right, the opinion is altogether unfounded. This can be readily verified by a comparison of the provisions of the Saxon codes, as given by Reeves, Spence, or Hallam, with the treatises of Glanville and Bracton, and other early writers on the common law. "The laws of the Anglo-Saxon kings," says Maddox, in a passage quoted by the writers named, "are as different from those collected by Glanville as the laws of different nations." (Hallam, Middle Ages; 1 Spence, Eq. Jur. 122, 126; 1 Reeves, Hist. Com. L., c. 4, p. 285.) "There is not," adds Reeves, "the least feature of resemblance between them."

of the few meagre provisions of the old Saxon law with reference to private rights, which were soon to become obsolete, was there any law at all other than justice or right, as commonly received in the community.

The jurisdiction of the King, therefore, consisted in the power and duty to administer justice and right, and was, with the exceptions above stated, altogether unrestricted, either by positive regulations or otherwise, except by the nature of the function itself.

This jurisdiction was never formally parted with by the King, but was, in fact, exercised by the King himself, either personally or by judges to whom jurisdiction was temporarily delegated by him. And although, in the course of time, regular courts came in the manner we have explained to be established, they did not, as originally constituted, nor did the *Curia Regis*, from which they were derived, have any general jurisdiction to decide all or any particular class of cases, but only a special jurisdiction to determine such particular cases as might be especially referred to them by the King.

Hence it became a fundamental principle of the law, and one that exercised a controlling influence in determining the course and nature of its subsequent development, that the King's writ, or the "original writ," was essential, in every case, to confer jurisdiction upon the court.[1]

Hence the form and nature of actions, and the question whether in any particular case an action would lie, were determined by the original writ; or, what amounts to the same thing, by the Chancellor, upon whom devolved the function of determining the cases in which the writ should issue. This function, therefore, was strictly judicial in its nature, and consisted merely in determining whether in the case presented there was a right for which a remedy was required; and his functions were therefore, in this respect, substantially identical with those of the prætor in the Roman law; that is to say, in the one case it was the function of the prætor, and in the other of the Chancellor, to determine whether upon the facts presented an action would lie, and the form and nature of the action.

In other respects, however, the functions of the Chancellor differed from those of the prætor; "for, though the Chancellor issued all writs, the judges of the common-law courts assumed exclusive jurisdiction to decide upon their validity, disregarding the sanction of the Chancellor and his college of clerks. Nor could the Chancellor declare

[1] "These writs were made out in the name of the King, but with the teste of the Grand Judiciary; for the making and issuing of which (as well as for other offices) the King used to have near his person some great man, usually an ecclesiastic, who was called his Chancellor, and had the keeping of his seal." (1 Reeves, Hist. Com. L., Finlayson's ed., 267.)

"And for the ease of the Chancellor, who, besides having the care of the great seal, had other important duties to perform, there were associated with the Chancellor a certain number of clerks, called *præceptores* (afterward masters). . . . Their duties as regards the issuing of writs were to hear and examine the complaints of those who sought redress in the King's court, and to furnish them with the appropriate writs. . . . Besides the masters, or superior clerks, there were six other clerks belonging to the Chancellor, whose duty it was to engross writs not strictly of course, and junior clerks to write out from the register of the chancery, in which the forms of writs were enrolled, those writs which were of course." (1 Spence, Eq. Jur. 238, 239.) This description of the function of the Chancellor and his clerks in the issuing of original writs is to be understood, however, as referring only to latter times, when his jurisdiction, like that of the common-law judges, had become established by usage, to the exclusion of that of the King. Originally, he acted as a mere officer or deputy of the King.

what should be a sufficient defense to an action ; indeed, with this part of the judicial machinery he had no opportunity to interfere."[1]

While on the one hand, therefore, the jurisdiction of the common-law courts was limited to the cases delegated to them by the Chancellor, on the other hand, the jurisdiction of the Chancellor to grant writs was limited by that of the common-law courts.

From this, and the strict subserviency to the authority of former decisions, which at this period, and for some centuries afterward, characterized the common-law courts, it resulted that the forms of writs originally devised (a register of which was kept in the chancery) came to be regarded as precedents beyond which the power of the Chancellor to grant writs could not be exercised. On the other hand, in all cases where a precedent could be found in the register, the writ issued as of course; and thus the function of granting writs, originally *judicial*, ultimately, by force of custom, became merely *ministerial*. The jurisdiction of the common-law courts thus became, in effect, *a general jurisdiction* over all that class of cases for which precedents could be found in the register, instead of *a special jurisdiction* in each case delegated to it, but was rigidly limited by the precedents.

With this change in jurisdiction a corresponding change also took place in the form of the law itself. As we have seen, in the beginning the exercise of jurisdiction, whether by the Chancellor or judges, or by the King, was unembarrassed by positive rules, either statutory or established by precedent, and cases were decided by the principles of natural justice generally received in the community. At that time, therefore, the administration of justice, in so far as the functions of the courts were properly performed, was in fact precisely what its name indicated ; which is but to say, in other words, that right or justice constituted the law, and the only law of private right, or *jus*, at that time existing in England, In the end, however, not only had the power of the Chancellor to issue new writs ceased, or rather ceased to be exercised, and the jurisdiction of the courts thus come to be limited by the precedents found in the register, but in exercising even this limited jurisdiction the judges had imposed upon themselves the fetters of an iron rule, which bound them rigidly to follow their own prior decisions, and those of other judges. Thus the law, so far as expressed, became in the main a mere body of rules established by precedent, or the custom of the court ; and at this period, therefore, we find very nearly realized the ideal of those jurists who hold that the law consists, or ought to consist, of rigid rules, at once absolutely controlling and limiting the jurisdiction of the courts, and unsusceptible of change except by legislative power ; and, it may be added, it would be difficult to conceive of a more perfect *reductio ad absurdum* of the theory itself than was presented by the law at that time, or a more striking illustration of Lord Mansfield's remark, that "the law of England would be an absurd science if founded on precedents only." For, in establishing the rule that for the future justice should be administered only in those cases in which it had previously happened to be administered, the Chancellor and judges to that extent had abdicated the function of administering justice which had been intrusted to them ; and thus the law as administered by them had become grossly inadequate to the administration of justice, and the clearest and most obvious rights were often without remedy.

[1] 1 Spence, Eq. Jur. 324, 325.

To remedy this evil it was enacted by the Statute of Westminster, 2, 13 Edw. I. c. 24, that, "As often as it shall happen in the Chancery that in one case a writ shall be found, and in a like case (*in consimili casu*) falling under the same right, and requiring like remedy, no writ shall be found, the clerks in chancery shall agree in making a writ, or adjourn the case to the next Parliament, and write the cases in which they cannot agree, and refer them to the next Parliament, lest it happen for the future that the court of our lord the King be deficient in doing justice to the suitors."[1] And had this act been originally construed as liberally as it has been in modern times, it would have gone far to remedy the evil which it was designed to obviate, and perhaps, as Sir William Blackstone has remarked, "might effectually have answered all the purposes of a court of equity."[2] But the act itself was defective in conferring power to issue writs *in consimili casu* only, and not in entirely new cases; and the same mental habits in the judges which had caused the original evil, prevented them from giving it a liberal construction. Hence the evil remained unabated, and the jurisdiction of the common-law courts continued to be grossly inadequate to the performance of the function for which they had been originally created—namely, the administration of justice.

It is not, however, to be assumed that the law, though thus modified, had undergone any essential change in its nature. Every step in its development had consisted in the application of principles, or supposed principles, of natural right to cases actually presented; and hence, in theory, and, so far as the function of the courts had been well performed, in fact also, the law still continued to be natural right; for, as already observed, the fact that principles of natural right were recognized by the courts did not in any way alter their essential nature. Hence the sole question as to the nature of the law at this period is, not whether its principles were recognized and rigidly observed, but whether those principles were or were not, in fact, rational and just; and upon this question there is no room to doubt but that an affirmative answer must be given.

For though errors and mistakes had occurred, and false principles had thus, to some extent, become established in the law, the work, in the main, had been well done; and though the process of development had been checked by the absurd regard at that time paid to precedent and authority, it was in the main, as far as it went, rational in its character; and the law, as a whole, fairly justified the assertion of Coke and other lawyers, that "the common law itself is nothing else but reason."

For the earlier judges and chancellors, who were generally ecclesiastics, were all, fortunately for the interests of civilization, more or less familiar with the Roman civil law, and did not hesitate to avail themselves freely of its rational principles; and thus there was rapidly developed a system of law or right, consisting, like the civil law itself —from which it was mainly adopted—in principles of natural right, differing from the popular notions of justice only in being more logically developed and expressed.[3]

[1] 2 Blackstone, Com. 51. [2] *Id.* 51.

[3] Mr. Spence is of the opinion that "there is scarcely a principle of the law incorporated in the treatise of Bracton that has survived to our time which may not be traced to the Roman law" (1 Eq. Jur. 131); and this he regards as natural and proper. "To have neglected to take advantage of the assistance which was thus

It is also to be observed that the law, as then established, had not reached anything like the stage of development at which it has now arrived. For at that time nothing like a complete system of right had been developed, but the positive law consisted mainly of the remedial law, or rules prescribing actions; it did not, to any considerable extent, purport to create or define rights, but assumed their independent existence, and simply provided remedies for their enforcement.

The continued existence of the principles of natural right as part of the law was, therefore, necessarily implied, and without them the law would have been fragmentary and incomplete.

Thus the sole remedies of that time for the enforcement of contracts were the actions of debt and of covenant, the former of which lay for the recovery of a debt—that is, a liquidated or a certain sum of money alleged to be due—and the latter for the breach of a contract under seal or specialty.[1] These actions, though manifestly inadequate, rested upon, and therefore implied, the principle of contract; and that principle, therefore, constituted part of the law, not only to the extent to which it is was actually recognized and enforced by the courts, but in its entirety. For it constituted the reason or ground of the positive rules of the law providing for the establishment and conduct of these actions, and in which, indeed, they originated; and it is a maxim, as well of the law as of reason, that the law consists not in particular precedents, but in the reasons upon which they rest.

§ 2. *Of the Development of Equity Jurisdiction.*

In considering what the law of England was at this time, moreover, we must not confine our attention to the law as administered by the ordinary courts, for the jurisdiction of those courts was only part of the general jurisdiction to administer justice originally vested in the King; and there still remained vested in him an extraordinary or prerogative jurisdiction, not only to supply the defects in the jurisdiction of the courts, and to administer justice in cases not provided for, but also to relieve against hardship and injustice in the exercise of the jurisdiction delegated to the courts.[2] This jurisdiction had from the first existed, and had been exercised by the King either in person or by referring particular cases to his council or the Chancellor; but in the reign of Edward III., owing to the inadequacy of the ordinary jurisdiction to the complete administration of justice, the cases calling for its exercise had become too numerous to be conveniently disposed of in this way; and, probably in consequence of this, a writ of ordinance was issued in the twenty-second year of that reign, conferring upon the Chancellor general jurisdiction of all cases calling for extraordinary or equitable relief.

"The establishment of the Court of Chancery as a regular court for administering extraordinary jurisdiction is generally considered to have been mainly attributable to this or some similar ordinance,"[3]

offered," he justly observes, "would have argued a high degree of presumption or gross and culpable ignorance. Neither is to be imputed to the founders of our system of jurisprudence."

[1] 1 Spence, Eq. Jur. 224.

[2] 1 Spence, Eq. Jur. 326, *et seq.*. "*Adjuvandi, vel supplendi, vel corrigendi juris civilis gratia.*" (Dig. 1, 1, 7, § 1.)

[3] 1 Spence, Eq. Jur. 338.

and the result was that this court became vested with all the jurisdiction remaining in the King, which, as we have seen, extended not only to supplying the defects, but also to relieving against the injustice, of the jurisdiction exercised by the common-law courts, and was, therefore, at once suppletory to and corrective of the ordinary jurisdiction.

The jurisdiction of the court of chancery, therefore, while limited in one direction by the jurisdiction delegated to the common-law courts—so far as the same was adequate to the administration of justice—was in other respects unlimited, and extended to the administration of justice or right between man and man in all cases where the jurisdiction of the common-law courts was inadequate to the purpose.

In the exercise of this jurisdiction, the Chancellor was avowedly governed by the principles of natural right. This is indicated by the title of the court—which, as we have said, was called the court of equity—and also by various terms, all expressing the idea of natural right, such as conscience, good faith, honesty, reason, justice, right, and equity, which were habitually used to denote the principles by which his decisions were determined. That this was true of the court as originally organized, and for several centuries afterward, is agreed upon all sides; and it must, therefore, be taken as an admitted fact that during this period—which may be roughly defined as extending into the reign of Charles II.—justice or right, in the ordinary and familiar sense of the terms, or, in other words, natural justice or right, avowedly constituted the rule by which the decisions of the Chancellor were governed, and therefore constituted the law, or *jus*, of England, so far forth as administered in the court presided over by him.[1]

The jurisdiction thus vested in the court of chancery consisted, therefore, in the general power—previously vested in the King—to administer justice, according to the principles of equity or natural right, in all cases where the jurisdiction of the courts of law was inadequate; or, as it was more usually expressed, in all cases where there was no remedy at law; or, in other words, the jurisdiction of the court of chancery was "in reality the *residuum* of that of the *Commune Concilium*, or *Aula Regis* (or, in other words, of the King), not conferred upon other courts, and necessarily exercisable by the crown as a part of its duty and prerogative, to administer justice and equity."[2] Accordingly, "Equity Jurisprudence" is defined by the eminent authority we have cited to be "that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of law;[3] and this definition—if we understand the term justice in its proper sense, as denoting what is commonly but tautologically called natural justice—precisely defines the nature of

[1] 1 Spence, Eq. Jur. 339, 341, 346, 407, 408; 1 Pomeroy, Eq. Jur. secs. 46, 50, 55; 1 Fonbl. Eq., Bk. 1, Ch. 1, sec. 3; 1 Story, Eq. Jur. secs. 8, 21.

[2] 1 Story, Eq. Jur. 49: "The jurisdiction then may be deemed, in some sort, a resulting jurisdiction in cases not submitted to the decision of other courts by the crown or Parliament as the great fountain of justice." (*Id.* 42) The words "or Parliament" should be omitted, as tending to obscure the true conception. "Lord King deduced the jurisdiction of the Court of Chancery from the prerogative of the King to administer justice in his realm, being sworn by his coronation oath to deliver his subjects *æquam et rectam justitiam*. . . . The method of application was by bills or petitions to the King, sometimes in Parliament and sometimes out of Parliament, commonly directed to him and his council." (*Id.* 44.)

[3] *Id.* 525.

equity as it existed prior to the consolidation of the courts of law and equity.

An opinion, indeed, prevails that of late years this has ceased to be a true description of equity, and that its nature has, in fact, become essentially changed. "Equity," it is said, "has nothing to do with the moral law," or, as it is variously called, "the natural law, the law of Nature, the principles of right and justice."[1]

"The whole question by which the extent of the equity jurisdiction is practically determined is no longer whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate—although the latter inquiry is sometimes made, and treated as if it were controlling; the question is rather, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity."[2] But this opinion, if well considered, will appear to be without foundation, for several reasons:

First—It is admitted that, until a comparatively late period, equity or natural right in fact constituted the law of this court, and that the Chancellors were avowedly governed by it. It is also admitted that, in the exercise of this jurisdiction, it was the constant practice of the Chancellors to administer justice in all new cases presented to them; and, indeed, it was by this exercise of jurisdiction that equity was developed. It would, therefore, seem incumbent upon those who assert that this essential change in the nature of equity has taken place to point out how and when it occurred. Manifestly such a radical revolution could not have been effected otherwise than by legislative enactment, or by a long series of concurring decisions; but, in fact, neither can be cited, and the opinion is, therefore, without foundation

Secondly—It is also opposed to a fundamental principle of political science, and of our own political system. No proposition can be more certain than that it is the function of the State to administer justice between man and man, and it has been expressly asserted in all the fundamental laws of the English race, from Magna Charta down to the latest State Constitution, and nowhere more expressly and emphatically than in the Constitution of the United States.

There must, therefore, be vested in some tribunal the power to administer justice in cases not provided for by the existing law as formally expressed.[3] Under the Roman system this jurisdiction was vested in the prætors, the ordinary judges. In our system it is still vested in the court of equity, whose duty (according to the golden rule of Lord Cottenham) it is "to adapt its practice and course of proceedings to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy." The modicum of truth contained in the opinion of Mr. Pomeroy is, that the development of equity jurisprudence has not only been rational and just, but has been so far complete that few cases can ever arise which are not fairly embraced within some of

[1] 1 Pomeroy, Eq. Jur. 63. [2] *Id.* 62.

[3] "That there must be in every scheme of jurisprudence a system of equity to correct the positive law, and supply its deficiencies, all experience shows." (1 Spence, Eq. Jur. 715.)

its "settled principles and heads of jurisdiction." It might, therefore, seem that practically no objection could be urged to the proposition that equity jurisdiction is limited to the cases in which it has already been habitually exercised. But it is always objectionable to substitute an accidental for an essential definition, and peculiarly so in the present case; because to consider equity, or the law, as made up merely of precedents, would be to give an altogether false notion of its essential nature.

Of the nature of the development of equity, we have only to repeat here what has already been said as to the development of law in general, and of the old English law in particular. Every step in its progress has avowedly consisted in the application of principles of natural right to actual controversies presented, and has therefore been strictly judicial and not legislative in its character. Hence, precisely to the extent that the function of the judges has been rightly performed, equity consists of principles of natural right, and, in fact, is natural right.

The fact that its principles, or most of its principles, are, and for a long time have been, recognized and observed by the courts—some of them for ages—we repeat, is not inconsistent with the proposition that they still continue to be principles of natural right, but, on the contrary, constitutes the most conclusive proof of their character as such. For it may be stated as a universal proposition that no principle can ever endure in the law unless it is a true principle of right.

Hence, the *jus civile* of every system, though often asserted to be immutable except by legislation, is always constantly though slowly changing, and at the end of different stages in the progress of the law is altogether different from what it was in the beginning. "For," as Coke says in a passage already quoted, "the principles of natural right are perfect and immutable, but the condition of human law is ever changing, and there is nothing in it which can stand forever. Human laws are born, live and die."[1]

Thus, as we have seen, the old Saxon law, though never formally abrogated, soon became obsolete. So, if we compare the law as it existed in the time of Edward I., or even at a much later period, with the law as it exists in America at the present day, we find that nothing remains of it but those principles of natural right which had then become recognized, and that all that was peculiar to the system, and which ran "counter to the *jus commune*, or common natural rule of right,"[2] or, in other words, the *jus civile* of that day, has silently and almost spontaneously passed away. Thus the principle—eternal and immutable—that every man has a right to the return of his property which he has intrusted to another, or of which he has been unjustly deprived, is still, and must ever be, a principle of the law; but the inadequate forms of action then provided for the enforcement of the right, after having been gradually supplemented by others, have

[1] "*Leges naturæ perfectissimæ sunt et immutabiles; humani vero juris conditio semper in infinitum currit, et nihil est in eo quod perpetuo stare possit; leges humanæ nascuntur, vivunt, et moriuntur.*" (Calvin's case, 7 Co. 12, 13.)

"The principles of natural right (*naturalia jura*), which are observed generally among all peoples, being established by a certain divine Providence, remain always firm and immutable; but those which each State has established for itself are often changed, either by the tacit consent of the people, or by some later law." (Inst., 1, 2, 6, 11.)

[2] Kaufman's Mackeldey, 121.

finally been abolished. So the principle that the payment of a debt extinguishes the obligation, is now, as it was then, a principle of the law; but the arbitrary rule that the action upon a sealed instrument could only be extinguished by acquittance or release under seal, no longer survives. So, too, the principles of natural justice determining the right of property in land are the same now as then; but the technical and sometimes absurd rules which grew out of the feudal system, and so long survived as a reproach to the English law, have, in America, by statute or otherwise, all been abolished; and the principles of our real estate law, though still encumbered by an immense amount of obsolete rubbish, are in the main purely rational, and require only a competent hand to reduce them to the same simplicity of form which characterizes the corresponding portion of the civil law.

Hence, though errors have occurred, and false principles have thus become established, they have never endured, but have ultimately been, or will be, eradicated; and hence *jus* has constantly approximated to perfection, and as it now stands, is more nearly identical with natural right than ever before; or, what is the same thing, and may perhaps be more readily admitted, the rights of men are now more fully recognized and protected than at any former time. Nor can there be a greater error than to suppose—as it has become too common to suppose—that the logical and scientific method which has effected such great results has become no longer applicable to the law; for the expression of the law is still far from being perfect, and we must in the future look to the same method for its perfection, and for the ultimate realization of justice and right.

CHAPTER II.

HISTORICAL DEVELOPMENT OF THE LAW (AS OPPOSED TO EQUITY).

§ 1. *General Remarks on the Development of the Law, and Division of the Subject.*

IN tracing the history of the law, it will be necessary to consider separately the development of the doctrine of actions, and that of the theory of rights. The development of the law commences with the former, and, in the earlier period of its history, is almost confined to it. For at this period rights, as commonly received in the community, are accepted by the courts without question or inquiry, and the functions of the courts are restricted mainly to devising actions for effectuating them. In this early development of the law, custom and authority have an influence far more controlling than in later times, after the spirit of scientific inquiry has been awakened; and hence it results—or at least such has been the case in our own and in the Roman law—that the actions first devised—which are called *legal* actions—become extremely technical, and are not only rigidly defined by precedent so as to include only cases precisely similar to those for which they were originally devised, but are restricted

to such cases only as have previously occurred, and for which precedents can be found. Hence, at the end of this its first development, the law in its formal expression has become a collection of rigidly defined formulæ; which are regarded by the mass of lawyers as a complete and final expression of the law, and as unsusceptible of further addition or development.

In the meanwhile, however, with the general growth of intelligence, the systematic investigation of morality, and especially of the theory of rights, has also progressed—and indeed, at this period, to a greater degree than any other branch of knowledge; for the subject of rights, and the other subjects of moral and political philosophy are naturally the first to attract the attention and interest of the awakening intelligence of the people. Hence, on the one hand (speaking still of the end of this early period), we have a freely-growing and progressive philosophy, and, on the other, a system of positive law expressed in rigid formulæ, into which, as into a procrustean bed, it is sought by a certain class of minds to imprison the growing civilization of the age.[1]

But this, fortunately for the interests of civilization, fails. Reason triumphs over authority, and the law is reformed by the introduction of an extraordinary or supplemental jurisdiction designed to supply the defects and correct the errors of the existing expression of the law, and which, on account of its rational and just character, is called Equity; and by this a more rational system is superadded to and gradually supersedes the old law.[2]

Under the latter system actions are no longer molded into rigid formulæ, but are left to be determined in their character by the exigencies of particular cases as they arise; and another difference is that rights themselves are systematically investigated, and a rational and scientific doctrine of rights evolved. And from this it results that the old law itself is gradually reformed, and a rational and scientific spirit introduced into its administration. The two systems thus approximate, and are finally welded into one, in which the equitable doctrine of right supplants and eradicates the technical and irrational part of the old law. Indeed, both in our own and in the Roman law, but more particularly in the latter, the doctrine of rights was from the first rationally treated; and the interposition of equity was rendered necessary, not from any defect in the theory of rights recognized by the courts, but on account of the inadequacy of actions only.

[1] Here with unprogressive races the development of the law ceases, and with it comes an absolute arrest of development of civilization generally. Authority triumphs over reason, and the character of the people, as in the case of the Chinese, the Hindoos, and other races, becomes molded into a fixed and enduring form or type. This, in fact, seems to have been the result with all the races of the world, except the European; with which the development of the law, commenced by the Greeks, was carried to a noble height by the Romans, and is destined, I confidently trust, to be carried to a still higher perfection by the moderns, and especially by the English race.

The same fate, however, of arrested development at last also overtook the Romans, under the later, and especially under the Eastern Empire; and would doubtless overtake us also, were it possible, as is fondly dreamed by some, for the law of a free and progressive people to be cast into a rigid and unchangeable mold.

[2] Thus far the history of the Roman, and of our own law, was precisely similar; but there was a diversity with reference to the manner in which equity was introduced. In the former, the equitable jurisdiction was assumed and exercised by the ordinary judges, the prætors; with us, it was from the first exercised by the King, and was ultimately vested in an extraordinary tribunal, the Court of Chancery. This, however, did not affect the essential character of equity, or the character of its development, which were substantially the same in both systems.

To this observation, however, one exception with reference to the English law must be made, which is presented by the peculiar, abnormal, and, we may say, monstrous creation of the old English law of real estate, to which, in the sequel, after considering the development of actions, our attention will be particularly directed. But even this must not be taken as in conflict with Coke's opinion that the common law is nothing else but reason; for the common law consists, not only of this technical and irrational system, but also of the equitable principles applied by the Court of Chancery to counteract it at every stage in its development. The principal evil, therefore, resulting from the peculiar technicality of the old common law has not been so much in its effect upon the administration of justice as in the profound and corrupting influence which it has exerted upon the minds of the lawyers, with reference to which we may quote the remark of Burke that, while the law "is one of the first and noblest of human sciences—a science which does more to quicken and invigorate the understanding than all other kinds of learning put together— . . . it is not apt, except in persons happily born, to open and liberalize the mind exactly in the same proportion."[1]

§ 2. *Of the Common-Law Actions.*

The different kinds of common-law actions were originally determined by the original writs, and were generally denominated by the use of some clause from the writ—as, for instance, the action of "Formedon," that of "*Quod permittat prosternere*," etc. These writs, as we have explained, were issued by the Chancellor, who was in early times always an ecclesiastic, and more or less versed in the Roman law. Hence, it naturally happened that the principles of the Roman law of actions were to a large extent imported into our law, and thus became the source of our law of actions.

Accordingly, actions are divided by Bracton, as in the Roman law, into Real, Personal, and Mixed.[2]

Mixed actions were those in which there was a concurrence in the same suit of a real and of a personal action—as, for instance, in a suit for land with damages for its detention. It will, therefore, simplify the matter to leave them out of consideration, remembering only that where a real and a personal action are included in the same suit, the proceeding is called a *mixed* action.

The *real* actions, as indeed was the case with the Romans, were used chiefly for recovering real estate; and from this the true meaning of the definition was lost sight of, and they finally came to be defined by English lawyers as those "whereby a man claims title to lands, tenements and hereditaments in fee or for life."[3]—thus substituting an *accidental* for an *essential* definition, and in the end entirely obscuring the true conception of the distinction between the two classes of actions.

All other actions were called *personal* actions, and were defined as

[1] To this is doubtless to be ascribed at once the high reputation and commanding influence of the leading minds of the profession, and the unsavory, and, I am afraid, well-deserved, reputation which, as a whole, it has always borne in the opinions of the masses; the sentiments of whom are not badly represented by the proposition of Dick the Butcher "to hang all the lawyers," as an essential preliminary to any real reform.

[2] 1 Spence, Eq. Jur. 223, 224, 234.

[3] Jacobs, Law Dict., "Action"; 3 Blackstone, Com. 117.

"those brought for the specific recovery of goods and chattels, or for damages, or for redress, or breach of contract, or for injuries of whatever description, the specific recovery of lands, tenements and hereditaments alone excepted."[1]

At what period these definitions were invented I do not know, but they are obviously based upon a perversion of the true distinction between real and personal actions, according to which, actions "brought for the specific recovery of goods and chattels" should be classed with real actions. We will, however, in this chapter follow the classification of the English lawyers.

The principal real actions may be enumerated as follows: the *Writ of Entry*, the *Writ of Assize*, the *Writ of Right*, the *Writ of Formedon*, the *Assize of Nuisance*, and the *Writ Quod Permittat Prosternere*, the *Writ of Estrepement* and the *Writ of Waste*, the *Writ of Dower*, and the *Writ of Quare Impedit*.

The Writs of Entry and of Assize were based upon the mere deprivation of the possession of the plaintiff by the defendant, and were designed to restore the possession of the land of which the plaintiff had been wrongfully deprived. They, therefore, did not involve the title. The Writ of Right lay upon the mere title, and could be brought either concurrently with the possessory actions, or after the right of recovery in them had been lost by the statute of limitations, or otherwise; the Writ of Formedon lay at the instance of the tenant in tail to recover the entailed premises; the Assize of Nuisance and the Writ *Quod permittat prosternere*, for the abatement of a nuisance; the Writs of Estrepement and Waste, for waste committed on land; the Writ of Dower, in favor of the widow to recover her dower from the heir; and the Writ of *Quare Impedit* to enforce the right to the presentation of a benefice.

"The principal kinds of personal actions originally known to the Common Law," as enumerated by Mr. Spence, "are the following, viz.: Debt and Covenant—which arise *ex contractu*—and Detinue and Trespass—which arise *ex delicto*."

The action of Debt lies where a person claims the recovery of a debt—that is, a liquidated or certain sum of money alleged to be due to him. It is commonly applied to debts due on bonds, or other documents under seal.

The action of Covenant lies where a person claims judgment for the breach of the promises made by an instrument under seal, or, in legal language, by speciality.

The action of Detinue lies where a party claims the specific recovery of goods and chattels.

The action of Trespass lies where a party claims judgment for an injury committed with violence against him, and this violence may be expressed or implied. Assault and battery is an instance of actual violence; a peaceable but wrongful entry upon the plaintiff's land implied violence.[2]

From the above list of actions several have been omitted. The first of these is the action of Replevin. This action is indeed referred to by Mr. Spence, but is omitted from his list, because, he says, "that though it is entertained in the Superior Court, it is not commenced there, but by plaint in the County Court, or Lord's Court." Blackstone also says that this action "is founded upon a distress taken

[1] Stephens on Pleading, 3.

[2] 1 Spence Eq. Jur. 224.

wrongfully, and without sufficient cause," and that "it is confined to cases of that character," [1] and the same view is followed by Stephens[2] and many other writers. But this is now recognized to be a mistake, and it is well settled that, as originally instituted, "it was an action founded on any taking by the party." [3] It was anciently brought in the King's Court by original writ; but, the remedy being found inconvenient and dilatory, it was provided by the Statute of Marlbridge (53 Hen. III., c. 21), that in the case of distress the sheriff might immediately (without the issue of the original writ) upon plaint made to him, proceed to replevin the goods," [4] and the remedy thus provided by statute became, on account of its convenience, the ordinary proceeding for replevying goods taken by wrongful distress; and in England, for other purposes, the action became obsolete. It continued, however, to be used in Ireland and in most of the United States, for the general purpose of recovering any goods wrongfully taken by the defendant.

There was also another action of a similar character, or rather a species of the same action, called the Writ *De Homine Replegiando*, which is thus described by Blackstone:

"The Writ *De Homine Replegiando* lies to replevin a man out of prison or out of the custody of any private person (in the same manner that chattels taken under distress may be replevined . . .) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him;" [5] and it is said by Mr. Jacobs [6] that "it hath been adjudged that it does not differ from a common replevin"—citing 2 Salk. 381.

Another action omitted from the list by Mr. Spence is the Writ of *Quo Warranto*, which was in the nature of a Writ of Right for the King against him who claims, or usurps, any office, franchise, or liberty."

There was also a peculiar application of the action of Trespass, called the action of Ejectment, to which we must refer, not only as interesting in itself, but also as illustrating the use of fictions by the courts for the purpose of enlarging the remedy and the influence of equity upon the law. This was used for the purpose of recovering possession of real estate, and in practice ultimately superseded all the real actions. The writ originally lay only in favor of a tenant who had been dispossessed of land held by him under lease, and sounded in damages only. "But afterwards, when the Courts of Equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice, and, in the prosecution of the writ of ejectment introduced a species of remedy not warranted by the original writ, nor prayed by the declaration (which are calculated for damages only, and are silent as to any restitution), viz., a judgment to recover the term, and the right of possession therefor. This method seems to have been settled as early as the reign of Edward IV." [7]

In order to give the benefit of this action to the owner in fee, the following expedient was invented. It being against the law for a party out of possession to make a lease or other conveyance, the owner in

[1] 3 Com. 146, *et seq.*
[2] Pleading, 19.
[3] Shannon *v.* Shannon, 1 Sch. and Lef. 327.
[4] Jacobs, Law Dict., "Replevin."
[5] 3 Com. 129.
[6] Law Dict., "*Homine Replegiando.*"
[7] 3 Blackstone, Com. 200, 201.

fee would enter upon the land, and, being thus in possession, would make a lease to another, and leave him in possession until he was ousted by the adverse occupant, or till some other person (called the casual ejector), either by accident or by agreement beforehand, should come upon the land and eject him. For this injury the lessee was entitled to his action of ejectment against the occupant, or this casual ejector (whichever it was that ousted him) to recover back his term and damages; but where the action was brought against such casual ejector, and not against the occupant, the Court would not suffer the latter to lose his possession without an opportunity to defend it, and hence it was a standing rule that recovery could not be had against the casual ejector without notice to the occupant; which was given in writing by the casual ejector, or by the real plaintiff in his name. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by ejectment was invented by Chief-Justice Rolle, during the exile of Charles II., which depended entirely upon a string of legal fictions. No actual lease was made, no actual entry by the plaintiff, no actual ouster by the defendant; but all were merely fictitious for the sole purpose of trying the title. To this end the declaration alleged a lease by the owner in fee to some lessee, either real or fictitious; that the lessee entered, and that the defendant, the casual ejector, ousted him. Thereupon the casual ejector, or rather the real plaintiff in his name, would send a written notice to the occupant, informing him of the action brought, and transmitting to him a copy of the declaration, with the notice that he, the nominal defendant, had no title and would make no defense, and advising the occupant to appear in court and defend his own title; that otherwise he, the casual ejector, would suffer judgment to be had against him, and thereby the actual occupant be turned out of possession. On receipt of this friendly caution, if the occupant did not, within the limited time, apply to the court to be admitted as defendant in place of the casual ejector, judgment went against the nominal defendant, and the actual occupant was turned out of possession. But if the occupant applied to be made a defendant, it was allowed to him, upon the condition that he would confess, at the trial of the cause, the lease and the entry of the lessee, and his ouster by the occupant himself; which requisites being wholly fictitious could not be proven by the plaintiff; but by such stipulated confession of lease, entry, and ouster, the trial proceeded upon the merits of the title only.[1]

Of the above actions it will be observed that the action of Ejectment, of Detinue, and of Replevin, and also that of *De Homine Replegiando*, though classed by the English lawyers as personal actions, are all in fact *real* actions.

To the actions originally existing at common law, important additions were made under the Statute of Westminster 2d, 13, Edw. I., c. 24, referred to in the preceding chapter; and these actions—which come under the generic name of "actions on the case," or of "trespass on the case," but which are really quite distinct in their nature from trespass—we will next describe.

It will be remembered that an action of trespass lies only for an injury committed with violence against the plaintiff, or as it is generally expressed in the declaration, *vi et armis* (with force and arms).

[1] 3 Blackstone, Com. 201–205.

The first innovation under the Statute of Westminster was to omit this qualification, and to permit an action for any malfeasance, such as slander, libel, etc., though committed without violence. "Thus, in an action against a shoeing-smith for laming a horse, in the 46 Edw. III., the objection was taken that the action was in trespass, and yet those words were omitted; but it was answered that "the plaintiff's writ was according to his case," and therefore good. "Trespass, therefore, in its ordinary sense, was no longer a necessary ingredient in an action of trespass on the case; the injuries which were the subject of these actions had the general name of torts, wrongs, or grievances."[1]

"The next step was to extend (the action) to non-feasance, or not doing what the defendant ought to have done."[2] To this much resistance was made; but finally, "in the 21st of Henry VII., the judges, in the exercise of their prætorian authority, held that an action on the case would lie as well for a non-feasance as for a malfeasance;" and hence the origin of the modern action of *Assumpsit*, which is now in constant use." The original action of trespass on the case, it will be observed, is *ex delicto*, but the action of *Assumpsit*—though historically so classed, is in fact generally *ex contractu*. It is now, however, generally considered as a distinct action from trespass on the case. This action, as ultimately developed, would lie for all wrongs for which there was no other peculiar action applying, and thus the principles of equity were to a large extent incorporated into the law. Hence, it was called the "Equitable Action."

There is also another species of the action on the case, which is now considered as a distinct action, namely, *trover and conversion*. This action was, in its origin, an action of trespass on the case for recovery of damages against such person as had found another's goods, and refused to deliver them on demand, but converted them to its own use.[3] The allegations of the declaration were, that the plaintiff on a day named was "lawfully possessed as of his own property" of certain goods, etc.; that he afterward "casually lost them out of his possession"; and that the defendant "found them," and refused on demand to redeliver them, and "converted them" to his own use.[4] The allegations of the *loss* and *finding* of the goods are considered immaterial; and the defendant is not permitted to deny them, the actual issues in the case being merely the plaintiff's title, and the conversion by the defendant.

Of the actions enumerated, all the real and mixed actions (according to the classification of the English lawyers), with the exception of the Writs of Dower and *Quare Impedit*, became obsolete, and were finally abolished by the Statute 3 and 4 of William IV., c. 27, sec. 36. The Writ of *Quare Impedit* has never been in use in America since the Revolution, and the Writ of Dower has been superseded entirely by the proceeding in equity for assignment of dower.

The Writ *De Homine Replegiando* also was entirely superseded by the more efficacious Writ of *Habeas Corpus*. The action of Covenant has also in effect been rendered obsolete under the reformed practice, by the abolishment of the distinction between sealed and unsealed instruments, by which it has become merged in the action of assumpsit; and this, indeed, is also the case with reference to the action of Debt.

The remaining actions continue to exist, and, adopting the true dis-

[1] Spence, Eq. Jur. 242.
[2] *Id.* 242.
[3] 3 Blackstone, Com. 152, 153.
[4] Stephens on Pleading, pp. 40, 41.

tinction between actions *in rem* and actions *in personam* may be classed as follows :

Actions *in rem :* Ejectment, Detinue, and Replevin (both of the latter in our system embraced under the denomination of actions to recover personal property), *Habeas Corpus* and *Quo Warranto.*

Actions *in personam :* Assumpsit, Trespass, Slander, Libel, and all other actions coming under the denomination of Trespass on the case, and Trover and Conversion.

§ 3. *Of the Common-Law Doctrine of Real Estate.*

The law of real property, as it exists at the present day, is almost entirely rational in its character, consisting mainly in the application to the subject of the principles of contract. There is no intrinsic difficulty in the acquisition of real estate ; and it needs, as we have observed, but a competent hand to reduce the law to the same simplicity that characterizes the law of personal property, and the Roman law of property, both real and personal. It has, however, reached this condition only after a tortuous and difficult development from an artificial and technical system established in a rude age ; and its history is that of a long and arduous struggle of eight hundred years' duration, every step of which has been bitterly contested, but by which it has been brought substantially into a rational state. It still retains the scars of the conflict in the technical forms in which the legal part of the doctrine is expressed ; and these have to be mastered in order to learn that the heart of the Common Law (as the old lawyers used to fear) has in fact been eaten out by equity, and that every peculiar rule and principle of the system has thus, or by express statutory enactment, ceased to be a living principle of the law.

The burden is thus imposed upon us of learning the law of real estate through its history, and of thus arriving by a difficult path at a knowledge of it, which, were it well expressed, might be readily attained with a tenth of the labor.

Under the old Saxon law, lands were generally held in absolute ownership, or by what is called *allodial* title (equivalent to the *dominium directum* of the Roman Law), and could be transferred by the owners at pleasure, either with or without writing, and with or without formal delivery of possession. They could also be disposed of by will, and estates in them could be created to commence *in futuro,* as well as *in præsenti.* In fine, the law of real estate was then very much as it is now, with the exception that now the transfer must be in writing. Upon the Conquest, however, all this was changed. Nearly all the lands in the kingdom were seized by the Conqueror, and by him granted to his followers to be held by feudal tenure ; and even those lands which were left to the native English were converted into feuds, and the allodial titles of the owners into feudal tenures. Thus all the lands in England came to be held by feudal tenure of the King, and subject to the then existing principles of the feudal law ; according to which the title or ownership of the land (the *dominium directum*) remained in the King, and the tenant had a mere right of user (*dominium utile*), subject to the performance of feudal services to the lord, and to forfeiture for failure to perform them.

The grantees, or tenants of the King, in turn made similar grants to others, and they again to others ; and "thus every freeholder of

lands became the permanent feudatory of some superior lord, ascending in regular gradations to the head of the State—each, in addition, being bound by oath of allegiance to the King, to which his duties to his immediate lord were made to bend."[1] But by the Statute of *Quia Emptores*, passed early in the reign of Edward I., and the subsequent Statute *De Regia Prærogativa*, subinfeudations were forbidden, and it was provided that in the case of all conveyances, the grantee should hold immediately of the King.

According to the original principles of the feudal law, lands were inalienable by the tenant without the consent of the lord; and to secure the rights of the lord in this respect, as well as for the sake of notoriety in the transfer, lands could only be conveyed by feoffment—which is defined by Blackstone to be "the gift of any corporeal hereditament (or land) to another;"[2] and of which the formal delivery of possession, or, as it was termed, "livery of seisin" was an essential part; and though, under the relaxed form of the feudal system as it existed at the time of the Conquest, feuds had become alienable without the consent of the lord, the rule that lands could be conveyed only by feoffment with livery of seisin was still in force, and became a fundamental principle of the English law. From this rule it followed that lands could not be disposed of by will,[3] and also that a freehold estate (*i. e.*, an estate for life, or in fee) could not be created to commence *in futuro*.[4]

The latter rule was, however, to some extent evaded or relaxed by the invention of the doctrine of *remainders*. According to this all possible interests in land from any given time to the end of the world were regarded as constituting one estate, of which all lesser estates or interests that might be created formed parts; and it was held that, if an immediate estate for a limited period was granted with livery of seisin, other estates, to commence *in futuro* (called remainders) might at the same time be created without further livery. The immediate estate thus created was called "the particular estate, as being but a small part or *particula* of the inheritance; the residue or *remainder* of which is granted over to another."[5] It was not necessary to the validity of a remainder that the particular estate should be a freehold; but, if a leasehold, livery of seisin was necessary to support the remainder, though not otherwise required. By this method, it was held, the rule forbidding the creation of estates *in futuro* was satisfied, because it was considered that the livery of seisin to the tenant of the particular estate, whether leasehold or freehold, was not to himself alone, but to all parties in interest; and that thereby the whole estate passed out of the grantor, and became simultaneously vested in the tenant of the particular estate, and the remainder-men designated in the grant.[6]

By this method the rigidness of the old law was somewhat relaxed. But otherwise the rule that lands could only be conveyed by feoffment with livery of seisin, and the resulting rules that lands could not be disposed of by will, and that estates, otherwise than as above stated, could not be created to commence *in futuro*, remained unaffected; as did also the rule most frequently applied to cases of violation of allegiance, that estates were forfeitable for non-performance of feudal duties.

[1] 1 Spence, Eq. Jur. 92, 93.
[2] 2 Com. 299.
[3] 1 Spence, Eq. Jur. 136.
[4] 2 Blackstone, Com. 165, 166.
[5] 2 Blackstone, Com. 165.
[6] *Id.*; 1 Spence, Eq. Jur. 156.

The latter rule resulted from the terms of the original grants, and was therefore but an application of the principles of contract; which then as now applied generally to the subject, except where restricted by some rule limiting their application. But the peculiar rules of the Common Law to which we have referred all grew out of the restriction upon the right of alienation imposed by the rule that lands could not be conveyed otherwise than by feoffment with livery of seisin. And out of these rules again grew the necessity for the interposition of equity to counteract their effect. The law was afterward profoundly modified by the Statute of Uses, passed in the reign of Henry VIII., the effect of which was to introduce into and make part of the law the principles theretofore developed in equity; but this can only be explained when we come to treat of the latter subject.

Another peculiarity of the Common Law was that the courts undertook to give to certain words, wherever they occurred in a deed or will, or other instrument, a fixed and unvarying meaning, according to which the instrument was to be interpreted, without regard to the real intention of the parties. This method of construction gave rise to numerous and voluminous rules, which of late years have become practically obsolete by the application of the simple principle that the intention must always govern.[1]

CHAPTER III.

HISTORICAL DEVELOPMENT OF EQUITY.

§ 1. *Of Equitable Actions.*

THE jurisdiction of courts of equity, or, as it may be more briefly called, the jurisdiction of equity, is divided into two branches, viz.:

(1) Jurisdiction to enforce legal rights, or rights recognized by the courts of law; and

(2) Jurisdiction to enforce equitable rights, or rights not recognized at law, but in equity only.

The former jurisdiction was exercised in cases where, though the

[1] The most remarkable instance of this technical method was the famous rule in Shelly's case, according to which, where an estate was limited to a man for life, with remainder to "his heirs," or "the heirs of his body," the word "heirs" was construed to be a word of *limitation*, and not of *purchase;* or, in other words, the grantee took the fee-simple estate, and the heirs nothing. The amount of learning that has been expended on this rule is enormous, and, though long since abrogated, the rule still continues to be a bugbear to the student. Out of a disregard of it, by Lord Mansfield, in the famous case of Perrin *v.* Blake—where it was clearly in conflict with the manifest intention of the testator—grew one of the bitterest and most protracted controversies that have ever agitated the profession. See the discussion of the rule by Chancellor Kent, 4 Com. pp. 214–233; and his pathetic lament (in the note to the last page), over the abolition of the rule, from which we extract the following:

"The juridical scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar."

right was recognized, there was either no remedy at law, or the remedy was insufficient. Thus in the case of a lost bond—upon which, on account of a technical rule, which required *profert* of the bond, an action could not be maintained at law—relief could be had by application to the Chancellor. So also in the case of the action of ejectment—which, as heretofore explained, was originally merely an action for trespass on land, and not for the recovery of the possession—the party prevailing, having established his right at law, could resort to the Court of Chancery to have the possession of the premises restored to him; though this equitable remedy has long since become obsolete by reason of the same relief being given by the courts of law.

An instance of the inadequacy of the legal remedy, and the consequent assumption of jurisdiction by equity, is presented by the action at law for account, and also the action for partition of land; both of which, on account of their inconvenience, have been superseded by the corresponding equitable actions.

This branch of equity jurisdiction was formerly very extensive, and of great importance; but its importance has, in some degree, been diminished by the consolidation of the courts of law and equity which has taken place in England, and generally in this country, and by the reformed system of pleading now generally prevailing. As the law now stands with us, and in most of the States, one court administers both law and equity, and the rules of pleading are the same for both classes of cases; and, hence, there has in fact been an entire consolidation of this branch of equity jurisprudence with the law; with reference to which it is important to observe that, wherever a conflict formerly existed between law and equity, the rules of the latter have entirely superseded the corresponding rules of the law.

It may be said, therefore, that this branch of equity jurisprudence has become part of the law, and no longer exists as part of an independent system; though for the present, owing to the condition of our text-books and treatises, the two systems have to a large extent to be studied independently. With the improvement of our text-books, this will cease to be the case.[1]

§ 2. *Of Equitable Rights, and Herein First of Uses and Trusts, Prior to the Statute of Uses.*

With regard to equitable rights, the most extensive and important are those known as equitable estates, and of these especially trusts, or equitable estates in land; to which, in order to illustrate the nature of Equity, it will be sufficient for us to refer.

The jurisdiction of the Chancellor over trusts, like all other branches of equitable jurisdiction, grew out of the inadequacy of the law for the purposes of justice, and the consequent necessity for the interposition of equity in order to prevent injustice.

In a former chapter, I explained such of the principles of the old common law as it may be necessary to understand in connection with the subjects of uses and trusts; of which the principal to be noted are the rules forbidding the disposition of lands by will, or the creation of estates to commence *in futuro*, and the principle that estates

[1] These remarks, however, are to be qualified by the observation that, in the Federal courts, the two systems are still kept separate; and as long as this continues to be the case, a knowledge of the two systems will continue to be necessary to the lawyer.

were forfeitable for non-performance of feudal duties, and especially for violations of allegiance. To these must be added the later provisions of the Statutes of Mortmain, by which conveyances to ecclesiastical or other corporations were forbidden. For to these rules of the law, or rather to the motive of evading them, uses and trusts owed their origin.

The terms *use* and *trust* are sometimes used as synonymous, and sometimes distinguished. According to the latter usage—which is to be preferred—uses are a species of trust, and the latter term must, therefore, first be defined.

A trust is said to arise where a conveyance of land is made either in trust that the grantee will simply hold the title for the use and benefit of the grantor, or such person or persons as may be designated in the conveyance, permitting the beneficiary, or, as he is called, the *cestui que trust*, to have the possession and exclusive use, or, in other words, the beneficial ownership of the land, or in trust that the grantee will hold and use the land for the purposes designated by the grantor. Trusts of the former class, in which the trustee is charged with no active duty, but merely holds the legal title for the benefit of another, without any control over the land, are called *passive* or permanent trusts, and are identical with uses; those of the latter, in which the trustee is charged with active duties, and has the possession and control of the land, are called *active* or special trusts.

"The introduction of uses, or *passive* trusts," says Mr. Spence, "is generally and with reason attributed to the clergy;" by whom they were invented for the purpose of evading the Statutes of Mortmain; and they were afterward made use of by the laity to enable them to defeat creditors of their executions, or for other fraudulent purposes. "Uses, therefore," he adds, "had their origin in the design to evade the provisions of the law, and it would seem solely for the purposes of fraud." They were afterward, however, put in practice for less objectionable purposes, viz.: to avoid the forfeiture of property during the civil wars which so long devastated England, and also to evade the rules of the law forbidding the disposition of lands by will, and the creation of estates to commence *in futuro*.[1]

At law uses were not recognized, but were treated as wholly void; nor for a long time after their introduction were they recognized in equity; and hence the beneficiary, or *cestui que trust*, was left wholly without remedy, and the performance of the trust left to depend upon the conscience of the trustee. In the reign of Henry V., however, at which time the greater part of the lands in England was held by feoffees in trust, it was no longer possible to leave the fulfillment of trusts to the mere honor of the trustee, or the coercion of the confessor; and the Chancellor therefore was applied to, as a judge for matters of conscience, and the applications were entertained. Instances of such applications in this reign were not numerous; but there were many in the reigns of Henry VI. and Edward IV., and in the reign of the latter the jurisdiction had become firmly established.[2]

At first it seems that the only uses or trusts recognized by the Chancellor were Express Trusts, or those created in express terms; afterward Resulting and Constructive Uses or Trusts were recognized and enforced.

A resulting use or trust was held to arise in all cases where, from

[1] 1 Spence, Eq. Jur. 440, 441.

[2] *Id.* 443, 444.

the facts and circumstances of the transaction, it was inferred that it was not the intention to convey a beneficial interest. Several classes of these may be distinguished.

(1) The first was, "where there was no intent expressed or capable of proof, and no effectual consideration could be proved or was to be implied, the use resulted to the feoffor; though at law, a deed, from its solemnity, imported a consideration in itself."[1]

In such case, in view of the general practice of conveying to uses, a mere conveyance of the legal interest no longer implied an intention to confer on the donee a beneficial interest; and hence "the Chancellor," says Lord Bacon, "thought it more convenient to put the purchaser to prove his consideration, or the purpose of the grant, than the feoffor and his heirs to prove the trust, and so made the intendment toward the use, and put the proof upon the purchaser."[2]

(2) As a corollary, it was held that where in the deed a trust was indicated, but the beneficial interest only partly disposed of, the remainder remained in or resulted to the feoffor.[3]

(3) Where a conveyance was made to one person and the consideration was paid by another, a use was implied in favor of the person from whom the consideration passed.[4]

Constructive uses or trusts rested upon a different principle, and applied to cases where it could not be presumed, either from the language or the acts of the parties, or the circumstances of the case, that it was the intention to create a trust, but where the legal title was obtained either by fraud or in such manner that it would be fraudulent for the legal owner to hold it.[5]

In the reign of Henry VIII., however, it was deemed inconvenient that the legal and the equitable estate in lands should be separate, or, in other words, that uses should exist; and there was accordingly passed a statute for the purpose of abolishing them by converting equitable into legal estates.

By the first section of that statute it was enacted that where any person stood seised, or at any time thereafter should happen to be seised, of lands to the use, confidence, or trust of any other person, in every such case the person entitled to the use or beneficial interest should stand and be seised, and be deemed and adjudged in lawful seisin, estate, and possession of like estates, as they had or should have in the use; or, in other words, that the legal title should be vested in him.[6]

The effect of this statute does not seem to have been what was anticipated by the legislature. Its result was twofold:

First—Simply to introduce into the common law new and more convenient methods of conveyancing than the old method of feoffment, with livery of seisin; and

Secondly—In equity to change the name of uses to that of trusts.

With regard to the conveyances referred to, it would be impossible to improve upon the explanation of them given by Blackstone under the head of "Conveyances Operating under the Statute of Uses." The learning upon the subject has, however, in most of the States become obsolete, and the subject need not therefore be further dwelt upon than to remark that, by the development of the equitable doc-

[1] 1 Spence, Eq. Jur. 451.
[2] *Id. ib.*
[3] *Id. ib.*
[4] *Id. ib.*
[5] *Id.* 452.
[6] *Id.* 462–464.

trine of uses and its incorporation into the law by the Statute of Uses, all the technical rules of the common law growing out of the feudal system were in effect swept away, and the law restored, in its practical effect, though not in its formal expression, to the simplicity of the allodial system.

The effect of the statute upon the equity doctrine of trusts is also well explained by Blackstone; but, as the subject is an important one, I add a few words of explanation:

First, there were some express trusts, which were held not to be within the intent or purview of the statute; namely, those in which special or active duties were imposed upon the trustee—as, for instance, when the trust was to sell for payment of debts or legacies, and some of a permanent nature, as, to manage the trust property, and to pay the profits to a *feme covert*, and the like. Trusts of this description required that the estate and use should be in the donee, to enable him to perform the trust reposed, and were therefore exempted from the operation of the statute.[1]

Secondly, the statute, as we have seen, brought the estate to the use, or, in other words, converted the equitable into a legal title; so that, after the statute, the *cestui que* trust became seised of the estate at law, as before he was entitled to the use in equity. Thus, where an estate was given to A and his heirs to the use of or in trust for B and his heirs, the legal estate was, by the statute, *eo instanti* vested in B; but as nothing was expressly said as to any ulterior use or trust that might be imposed, the statute failed, in a great measure, of its object. For the common-law judges held that there could be no use upon a use, but when the first use was declared there it must rest; or, in other words, that under the statute the legal title vested in the first usee. Thus, where A conveyed to B, to the use of C, to the use of D, the title would vest in C, and D take nothing; but the Court of Chancery held that, though these were not uses which the statute could execute, still they were trusts, which in consequence ought to be performed; and the law has stood on that footing ever since.

So that, as observed by Sir William Blackstone, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance. For the only effect produced by the statute upon the equitable doctrine was simply that, in order to create a trust, it was necessary to interpose an additional usee, or trustee, in whom the legal title would, by force of the statute, vest. The doctrine of uses, therefore, continued and continues to exist with but little modification, except that we now call them "trusts" instead of "uses."

§ 3. *Of Modern Trusts.*

Hence, we still have the same division of trusts as we had of uses, namely, into *express*, *resulting*, and *constructive* trusts; and, generally, the doctrines governing them before the statute still continue to apply. It remains, therefore, simply to explain a little more fully the nature of these several kinds of trusts, and to illustrate them by appropriate examples.

EXPRESS TRUSTS.—An express, or, as it may be more appropriately

[1] Spence, Eq. Jur. 486.

termed, an actual, trust is simply one created by the expressed will of the parties, or, in other words, by express contract. Hence the doctrine of express trusts is, in the main, a mere application of the principles of contract.

Some confusion arises with reference to this class of trusts, and, indeed, with reference to the classification of trusts generally, from the misuse of the term "implied trust." Properly speaking, this term applies only to resulting trusts, where, in absence of proof to the contrary, the intention to create a trust is implied as a conclusion of law, without any inquiry as to what the actual intention may have been—the case being precisely analogous to the implied promise presumed in law to exist where an obligation is shown, and also to the case of constructive fraud inferred conclusively from certain facts in the absence of adverse proof. In these cases frequently, and indeed generally, the supposed promise, fraud, or intention, as the case may be, is in fact created by the law; or, in other words, is a mere legal fiction. And, hence, "implied or resulting trusts" are properly classed under the head of trusts arising "by operation of law;" *i. e.*, trusts created by the law, and not by the actual will of the parties. But the term "implied trusts" is used, and we think improperly, by Mr. Perry to denote a class of trusts in which the trust is not specifically declared, but language is used from which the actual intention to create such a trust is to be inferred.[1]

The same mistake is made by some writers on contract, who class, under the head of "implied contracts," certain contracts in which all the terms are not fully expressed, but are left to be gathered from the nature of the transaction and the prevailing custom of dealing; as, for instance, where a man orders goods from a store, and nothing is said about the price; or where a man writes his name upon the back of a negotiable instrument. In the former case, there is undoubtedly an express or actual contract to pay for the goods what they are reasonably worth; and, in the latter, that the title shall pass to the assignee, and that the indorser will pay the amount. For, as heretofore explained, the assent of the parties may be expressed either by language or by any other sufficient means; and, as a general rule, there can be no more satisfactory sign of the actual intention of the parties than the customary course of dealing. But, according to the true conception of the matter, an implied contract is in fact not a contract at all; and the same is true of an implied or resulting trust, in which

[1] "Implied trusts," he says, "are those that arise when trusts are not directly or expressly declared in terms; but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed through the medium of a trust. . . . Thus, if a testator make an absolute gift to one person in his will, and accompany the gift with words expressing a 'belief,' 'desire,' 'will,' 'request,' 'will and desire;' or, if he 'will and declare,' 'wish and request,' 'wish and desire,' 'entreat,' 'most heartily beseech,' 'order and direct,' 'authorize and empower,' 'recommend,' 'hope,' 'do not doubt,' 'be well assured,' 'confide,' 'have the fullest confidence,' 'trust and confide,' 'have full assurance and confident hope;' or, if he make the gift 'under the firm conviction,' or 'well knowing;' or, if he use the expressions, 'of course the legatee will give,' or, 'in consideration that the legatee has promised to give"—in these and similar cases, courts will consider the intention of the testator as manifestly implied, and they will carry the intention into effect by declaring the donee, or first taker, to be a trustee for those whom the donor intended to benefit." (1 Perry on Trusts, 112.)

it is immaterial whether there be or be not an actual intention to create a trust. What are called "implied trusts" by Mr. Perry are, therefore, obviously express or actual trusts, and they are generally so regarded; and they come directly within the definition of express trusts given by Mr. Pomeroy as being "those created by the intentional act of some party having dominion over the property, done with a view to the creation of a trust."[1]

It is a mooted question whether, at common law, uses could be raised by parol evidence. There seems to be no doubt that, where land was conveyed by feoffment, or fine and recovery, uses could be so proved; but whether a use could be raised by parol bargain and sale, or "covenant to stand seised to uses," seems to be doubtful.[2] The question, however, is immaterial, since the passage of the Statute of Frauds (29 Car. II. c. 3), by the seventh section of which it was enacted that all declarations or creations of trusts "shall be manifested and proved by some writing signed by the party who is by law to declare such trusts, or by his last will in writing;" or else they shall be utterly void and of none effect. But it was expressly provided that this provision should not apply to trusts arising or resulting by implication or construction of law.[3]

It will be observed that all that is required by this statute is that the trust should be manifested or proved by writing, and not that it should be thus created. Hence, it was held that the trust might be proved by any subsequent writing of the party; as, for instance, "a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond or deed, or by a pamphlet written by the trustees; in short, by any writing in which the fiduciary relation between the parties and its terms can be clearly read."[4]

These provisions of the Statute of Frauds have, in substance, been adopted in all the American States; but the language of the American statutes generally differs upon this point from that of the seventh section of the statute of Charles II.—the former generally providing that "a trust must be *created* or *declared* by an instrument in writing, signed by the party;" and the question has arisen whether this difference of language is to be construed as giving a different effect to the law. Upon this question Mr. Perry is of the opinion, upon the authorities cited by him,[5] that "upon sound reason, and upon decided cases, it would seem that the peculiar form of words in some of the statutes of the American States has not altered the general rule as established under the English statute, and that the same evidence would be generally received, in the United States, to establish a trust as in England."[6]

In Mr. Perry's work (which I am making my guide in this portion of my subject), a chapter is devoted to the discussion of the competency of the parties to trusts, and as to what property may be the subject of the trust. The subject, however, is merely a branch of the general law of contracts, and is disposed of by the principles governing the competency of parties thereto; though the chapter may be read with profit, with a view to perceiving the application of those principles.

[1] 2 Eq. Jur. 987. [2] 1 Perry on Trusts, § 75.
[3] *Id.* § 78. [4] *Id.* § 82. [5] Secs. 80, 81.
[6] In California, however, the more specific language of the statute would seem to demand a different construction.

It must be observed, however, that the real parties to a trust, in the eyes of a court of equity, are only the creators of the trust, and the *cestui que trust*, or beneficiary—the trustee being regarded merely as an instrument for the preservation and administration of the rights of the latter. Hence, if the trust is sufficient in other respects, its validity is not affected by any incompetency in the trustee; for it is a cardinal rule of equity that it will never permit a trust to fail for the want of a trustee; and hence, if the trustee is incompetent, or refuses to qualify, or abandons his trust, another trustee will be appointed.[1]

But, as in the case of all contracts, the party to receive a benefit under it must be clearly defined. Thus, a deed is absolutely void if there is no grantee, or the grantee cannot be ascertained; and the same principle applies to the case of trusts—if the beneficiary, or *cestui que trust*, cannot be ascertained, the trust is absolutely void.[2] There is a seeming exception to this rule in the case of charitable trusts. But this is not really an exception; for, in all such cases, the trust is in fact in favor of the State, which, upon rational principles, would seem, as a matter of right, to have the absolute control of all charities.

It is also a general principle, applying to all contracts, that the terms must be defined. And this principle equally applies to trusts, which are absolutely void, if the objects and purposes of the trust cannot be ascertained.[3] But, in the case of charities, it is a sufficient specification of the trust that it be for charitables purposes generally, *eo nomine*. The very term "charity," or "charitable purposes," must however be used, or the particular object and purposes of the charity must be specified; and in the latter case, the specific purpose designated must be one regarded by the courts as charitable. And, in general, "since the Statute of Elizabeth no bequests are deemed within the authority of Chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intendment,"[4] or unless the trust is for "purposes of charity in general." Hence, a bequest to the Bishop of Durham, to dispose of the same "to such objects of benevolence and liberality as the bishop, in his discretion, shall most approve of," and many similar trusts have been held to be void.[5]

RESULTING TRUSTS.—As we have explained, resulting uses were of three kinds, viz.:

(1) Where a conveyance was made of land or other property without any consideration or any distinct use or trust stated, a use resulted in favor of the grantor.

(2) Where the conveyance expressed a trust, but no intention appeared to give the grantee a beneficial interest, or the trust failed, a use resulted to the grantor as to the portion of the estate not disposed of.

(3) Where, on the purchase of land, the purchase-money was paid by one, and the conveyance taken in the name of another, a use resulted in favor of the party paying the purchase-money.

This classification was formerly applied to trusts, and it was supposed that, for each of the classes of resulting uses above enumerated, there was a corresponding class of resulting trusts. But it is at least

[1] 1 Perry on Trusts, § 38. [2] *Id.* § 83. [3] *Id.* § 83.
[4] 2 Story, Eq. Jur. § 1115. [5] *Id.* §§ 1156 *et seq.*

doubtful whether, since the statute, there are any resulting trusts corresponding to resulting uses of the first class.

It is, indeed, said by Judge Story that, where a conveyance is made without consideration and no trust is declared, a trust will result to the grantor;[1] and the same view is taken by Mr. Cruise[2] and other writers, and it was formerly so held in this State[3] (California). But it is, with reason, doubted by Mr. Spence whether this view can be sustained,[4] and it was indeed expressly repudiated by Lord Hardwicke in Lloyd *v.* Spillet,[5] and in effect in Young *v.* Peachy.[6]

This view of the case is followed generally by the later authorities,[7] and, on principle, would seem to be correct. For, as it will be remembered, the rule that, in case of a voluntary conveyance, a use would result, arose from the fact, existing at the period when the doctrine arose, that conveyances to secret uses were so common "that a simple conveyance of the legal interest no longer implied an intention to confer on the donee a beneficial interest,"[8] for, in point of fact, at that time "the greater part of the lands in England were held by feoffees in trust."[9] But this state of facts no longer exists; for now, in the immense majority of cases, conveyances, whether voluntary or otherwise, are made with the actual intention of conveying both the equitable and the legal title; and hence it would seem, upon a familiar maxim, that the rule should cease with the reason that gave rise to it. For the natural presumption arising with reference to a modern conveyance must always be that a benefit to the grantee was intended; and it is no longer reasonable that the grantee should be put to proof upon this point.

It follows that there cannot, in such cases, be a *resulting* or *implied* trust; for *ex vi termini*, such a trust cannot be raised by parol evidence of an actual extent—the rule being that, while parol evidence is admissible to rebut the presumption of a trust, and also to meet the evidence in rebuttal, it cannot be admitted to raise a presumption in the first place.[10]

It does not follow, however, that no trust of any kind can be proven. On the contrary, it is well settled that parol evidence is admissible to show that the deed was in fact made in trust, and was not

[1] 1 Eq. Jur. §§ 1197, 1198.
[2] Dig. tit. 12, ch. 1, §§ 51, 52.
[3] Russ *v.* Mebius, 16 Cal. 350.
[4] 2 Eq. Jur. 198, 199.
[5] 2 Atk. 150.
[6] *Id.* 257. "I am bound by the statute of frauds and perjury," says the Chancellor in the former case, "to construe nothing a resulting trust, but what are there called trusts by operation of law; and what are those? Why, *first*, when an estate is purchased in the name of one person, but the money or consideration is given by another; or, *secondly*, where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir-at-law. . . . I do not know, in any other instance besides these two, where this court have declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mala fide*."

It will be observed here that, in the case cited, there was in fact a nominal consideration recited in the deed, which seems to have been regarded by the Chancellor as immaterial; and, accordingly, upon the authority of this case, Mr. Spence lays it down that: "A merely nominal consideration . . . in the Court of Chancery is treated as no consideration" (2 Eq. Jur. 200)—a rule in conflict with what is said upon the subject by the Court in Russ *v.* Mebius, and in the passage from Judge Story, cited by the Court; but which, nevertheless, seems to be obviously correct.

[7] 2 Pom., Eq. Jur. § 1035; 1 Perry on Trusts, § 125; 4 Kent, Com. 306; 2 Fonb. on Eq. 116.
[8] 1 Spence, Eq. Jur. 451.
[9] *Id.* 443.
[10] 1 Spence, Eq. Jur. 568, 569.

intended to convey any beneficial interest. "If there are circumstances," says Mr. Spence, "from which it can be made out in proof that it would be a fraud in the grantee to retain the property as his own, parol evidence may be given of such circumstance to prove that the transaction was subject to a trust."[1] And it was so expressly held in Young *v.* Peachy, cited *supra*. And other authorities upon the same point will be cited when we come to treat of constructive trusts. But such a trust is manifestly not a *resulting*, but a *constructive* trust.

Wherever a trust is expressed in the deed as to part of the estate, the residue of the use results to the grantor.[2] And the same principle applies where property is conveyed by will or a deed, upon some trust which fails, in whole or in part, either because the trust is unlawful or not sufficiently definite, or where its purposes have been fulfilled. In all such cases a trust, either with reference to the whole property, or to the *residuum*, as the case may be, results in favor of the grantor, or his heirs or other representatives; and the same rule applies where the property given by will or deed is stated to be on trust, but no trust is declared, or upon a trust thereafter to be declared, but no such declaration is made.[3]

All of these cases come under the same principle, viz., that "if upon the deed there are any circumstances tending to show that a trust was intended, then the *onus* of proof is on the donee,"[4] or, in other words, the presumption is that no beneficial interest to him is intended, and a trust as to all the beneficial interests not exhausted by the express trust results to the grantor.

With regard to the second class of resulting trusts, the principles applying to them are so simple in their nature, and so familiar, as to render extended discussion unnecessary. The cases cited in the notes will sufficiently illustrate the subject, in all of which, it will be observed, the purchase-money was, in fact, actually paid over by the grantee, but he paid it on account of the other party, who thereby became his debtor for the amount paid; or, in other words, the money was paid by the grantee in pursuance of a loan to the other party. In all such cases, it is held that the money paid is in fact the money of the beneficiary, and that a trust resulted.[5]

The doctrine of resulting trusts is founded upon the presumption implied by law, under the circumstances stated, that a trust was intended. This is a strictly legal presumption, but not a conclusive one. It may in all cases be rebutted, and parol evidence is admissible for the purpose.[6] Evidence is also admissible to meet the rebuttal evidence, but not, as I have already said, either to raise or to fortify the presumption in the first place. The rule is thus expressed by Mr. Spence:

"Evidence cannot be offered to fortify a presumption in any case, excepting in order to sustain it against the effects of evidence given for the purpose of defeating it; for to admit it simply in support is unnecessary and hazardous, as affecting the rule of the court."[7]

[1] *Id.* 199, citing Hutchins *v.* Lee; 1 Atk. 447.

[2] 2 Story, Eq. Jur. § 1199; 2 Pom., Eq. Jur. § 1084; Schlessinger *v.* Mallard, 70 Cal. 326.

[3] 2 Pom., Eq. Jur. § 1032; 2 Story, Eq. Jur. § 1200.

[4] 2 Spence, Eq. Jur. 199.

[5] Hellman *v.* Messmer, 77 Cal. 166; Hidden *v.* Jordan, 21 *id.* 98; Millard *v.* Hathaway, 27 *id.* 140.

[6] 2 Story, Eq. Jur § 1199, n.

[7] 1 Eq. Jur. 569.

CONSTRUCTIVE TRUSTS.—*Constructive trusts* and *implied trusts* are frequently confounded or classed together; but the latter term, according to the better usage, is confined to *resulting* trusts, which rest upon the presumed or implied intention of the parties. A constructive trust, as distinguished both from express and from implied or resulting trusts, may be defined to be a trust which is raised by construction of equity in order to satisfy the demands of justice, without reference to any presumable intention of the parties.[1] The cases which range themselves under this division are those in which the legal title has not been conveyed "to the party in whom it is vested by way of trust, but has been acquired or is retained against conscience and equity."[2]

Such trusts "arise not only where property has been acquired by fraud and improper means, but also where it has been fairly and properly acquired, but it is contrary to some principle of equity that it should be retained by the party in whom it is vested—at least for his own benefit."[3]

Upon this point Mr. Pomeroy, in his valuable work on equity, seems to me to have fallen into a serious error. According to his view, "all instances of constructive trusts, properly so called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source."[4]

It is manifest, however, from the definitions cited, all of which are from eminent authorities, as well as from the authorities generally, that this view cannot be sustained; and, accordingly, the most approved writers upon the subject not only recognize this fact, but divide trusts of this character into those which arise from fraud and those which are raised by courts of equity upon other principles.[5]

[1] Smith, Manual of Eq. 166; 2 Story, Eq. Jur. §§ 1195, 1254.

[2] 2 Spence, Eq. Jur. 3.

[3] 1 *Id.* 511. Or, as it is expressed by Mr. Hill, in his work on Trustees (p. 116): "Wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the Court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment."

[4] 2 Eq. Jur. § 1044.

[5] Thus we find, in Mr. Perry's work upon the subject (§ 168), the following division of constructive trusts, viz.:

"(1) Trusts that arise from actual fraud practiced by one man upon another.

"(2) Trusts that arise from constructive fraud. . . .

"(3) Trusts that arise from some equitable principle independent of the existence of any fraud; as, where an estate has been purchased and the consideration money paid, but a deed has not been taken, equity will raise a trust by a construction for the purchaser."

And again he says, § 231:

"It frequently happens that Courts of Equity construe a trust to arise from the contracts and dealings of parties, although the trust is not within their contemplation, and there is no fraud, actual or constructive. . . . Thus, if parties enter into a valid contract for the sale and conveyance of lands . . . a Court of Equity looks upon that as already done which was agreed to be done; from the date of the contract it looks upon the beneficial interest as in the vendee, and the legal title only in the vendor. By construction, the vendor holds the legal title in trust for the vendee."

The same classification is adopted by Mr. Hill, who divides this class of trusts; into trusts arising from actual fraud, and trusts arising "by equitable construction, in the absence of fraud" (p. 170); and, to illustrate, he gives, as an instance of a constructive trust, the case of vendor and vendee, which is thus classed also by Tiffany and Bullard in their work upon Trusts (p. 490), and by Story (§ 1212).

Accordingly, we adopt the division of this class of trusts usually given, viz.:

(1) Constructive trusts arising from fraud; and

(2) Those raised by equitable construction, in the absence of fraud.

With regard to fraud, it is important to observe that equity will not only interpose to set aside a deed or other instrument procured by fraud, but will interfere also to prevent a meditated fraud, or a fraudulent use of the instrument.

This is an extremely important principle; to illustrate it we will suppose the case of a conveyance by A to B upon a parol trust that the grantee shall hold the land for the benefit of the grantor. In such case, if the grantee at the time he received the deed meditated a violation of the confidence reposed in him, it is obvious that equity would interpose; for the case would then be simply a case of obtaining the legal title by a false representation—as it is not to be supposed that the grantor would have made the deed had he known that the party intended to violate the trust.[1]

But suppose the case that B did not at the time intend to violate his trust, but honestly intended to carry it into effect, and that he should subsequently yield to temptation, and determine to hold the property as his own. Here, obviously, an express trust cannot be proven on account of the statute of frauds; nor, as we have shown, does a resulting trust arise; nor has the deed been obtained by fraud; yet it is equally obvious that no satisfactory distinction can be made between the two cases; and that equity should interpose to prevent the meditated fraud, as it would to rectify the fraud already committed. And this, contrary to an opinion very commonly prevailing, is in fact the settled doctrine of the law—the case presented being precisely that of Young *v.* Peachy, and also that given by Mr. Spence, to which I have referred.

One of the most important illustrations of this principle is that of a deed absolute on its face, given upon a parol understanding that it should be regarded as security for a debt only. In such case, as has been frequently held, parol testimony is admissible to prove the trust; and in one of these cases[2] the principles upon which equity acts in this class of cases are thus forcibly expressed:

"The doctrine is both novel and startling which restricts in matters of fraud its jurisdiction over the operation of a written instrument to those cases where the fraud has been committed in its creation. If maintained, it will sweep away its heretofore admitted jurisdiction in an infinite variety of cases of almost daily occurrence, where the fraud alleged consists in the use of instruments, entered into upon mutual confidence of the parties. Fraud in their use is as much a ground for the interposition of equity as fraud in their creation. There is no distinction in the principle upon which the jurisdiction is asserted in the two cases. In both there is the same abuse of confidence, and from both the same injury results." And, in another case, the Court says, with equal force:

"To allow the defendants under such circumstances to evade their promise would be to enable them to practice a fraud, and to convert a statute designed to prevent frauds into a shield for their protection."[3]

[1] 2 Perry on Trusts, § 1055.

[2] Pierce *v.* Robinson, 13 Cal. 128.

[3] Sanford *v.* Jones, 35 *id.* 487.

And, as we have said, the principle applies equally to all cases of conveyances upon parol trusts.[1]

Trusts raised by equity in the absence of fraud are extremely numerous, and include all cases of equitable estates, except those arising from some other species of trust. Such trusts arise, *ex vi termini*, in all cases where the legal title has been obtained, or is held, under such circumstances as to render it inequitable that it should be held by the party in whom it is vested.

The principle is thus expressed by Judge Story, with reference to money:

"One of the most common cases in which a court of equity acts upon the ground of implied trusts *in invitum* is where a party has received money which he cannot conscientiously withhold from another party; . . . illustrations of this doctrine are familiar in cases of money paid by accident, or mistake, or fraud."[2] In such case, the money can generally be recovered at law in *assumpsit*, which, as established in modern times, is [as we have said] called distinctively "the equitable action." Where this action can be maintained, equity will not interfere, but in other cases it will.

And the same principle with reference to other property is thus expressed by the Supreme Court of the United States:[3]

"These [referring to cases cited] are only applications of the well-established doctrine that, where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner."[4]

It is important to observe that constructive trusts are not in fact trusts, but are improperly called so, because they resemble trusts in several important particulars, and are in many respects governed by the same rules. In the same way we apply the term "implied contracts" to certain obligations not arising from contract, but which, in the Roman law, are more correctly called *quasi* contracts, implying merely that they resemble contracts; and, in the same way, constructive trusts should be considered rather as *quasi* than as actual trusts. There was no impropriety in the employment of the word "use" in this connection, and it is unfortunate that the term "trust" has been substituted. But the expression "constructive use," to designate this class of rights, has become obsolete, and cannot be revived. The term "equitable estate" expresses, however, precisely the same idea; for an equitable estate, if not an active trust, is nothing more than a

[1] Young *v.* Piper, cited *supra*; 2 Spence, Eq. Jur. 199.

[2] 2 Eq. Jur. 1255.

[3] Stark *v.* Starrs, 6 Wall. 419.

[4] In what has been said upon the subject of trusts, I have had reference more particularly to rights, or estates, in land. The same principles apply generally to trusts in personal property—subject, however, to the qualification that the separation of the equitable from the legal title is not so common in the case of personal property, and that often under circumstances where, were the case one of real property, an equity only would vest, the beneficiary would take the whole title to personal property. The most important case—other than that of express trusts—of an equitable right, or interest in personal property distinct from the legal title, is that arising from the assignment of choses in action. By the common law, choses in action (except in the case of negotiable instruments) were not assignable; but the validity of the assignment was always recognized in equity. But by modern statute, in both England and the United States, assignments are allowed. The jurisdiction of equity over such assignments has thus been greatly curtailed, but it still exists in the case of partial assignments of contracts, which at law are void. The subject is discussed, and explained in the case of Grain *v.* Aldrich, 38 Cal. 514.

use in property vested in one person, of which the legal title is vested in another. The term is, therefore, equally applicable to constructive, or *quasi*, as to express or actual trusts, and is, perhaps, the most appropriate term by which to designate at once both classes of rights.

PART III.

OF THE NATURE AND OF THE METHOD AND PRINCIPLES OF RIGHT.

CHAPTER I.

DEFINITION OF RIGHTS.

AS we have observed, there is implied in every right the liberty or power of acting freely with reference to the subject of the right.

The terms "liberty" and "power" to act are very nearly synonymous, the difference between them corresponding precisely to that between the terms "may" and "can," and they may, therefore, be used indifferently in the definition. The last term, however, is more commonly used to denote not merely ability or power to act (*facultas agendi*), but control or power over others—a notion, as we shall see, not necessarily involved in the idea of a right; and, on account of this ambiguity in the word *power*, the term *liberty* is to be preferred.

The term "liberty," in its general sense, denotes the absence of any impediment to the performance of that which a man wills to do, and implies the absence of physical or natural impediments, as well as those which are interposed by man. But jurisprudence is not concerned with impediments of the former class, but with the latter only; and the term "liberty," as used in jurisprudence, therefore, denotes merely the absence of restraint by others upon the free performance of volition.

This liberty or power, however, is not to be understood as actual liberty or power; for, whatever theory of rights we adopt, it is clear that a man may be prevented from exercising his right without losing the right itself. Thus, for instance, a man has a right to his liberty though unjustly imprisoned, and to his property though unjustly deprived of it; and, in general, though a man may be deprived of the enjoyment of his right by violence or other injustice, he cannot be thus deprived of the right itself, except in the case of the extinction of the subject of the right, or of himself. The liberty or power in which a right consists is, therefore, to be understood according to one theory as *legal*, and according to the other as *jural*, liberty or power;

that is to say, according to the former a right consists in the liberty or power which it is the will of the State a man shall have, or, in other words, which, according to the will of the State, he ought to have; and, according to the other, in the liberty or power which it is right for him to have, or which, according to right, he ought to have.

Indeed, according to the most logical and consistent of the supporters of the former theory, the will of the State is itself the paramount standard of right and wrong; and the latter definition will, therefore, equally apply to both theories; for, upon this hypothesis, whatever the State wills is *ipso facto* right. Hence the issue between the two theories resolves itself, not into the question of the definition of rights, but into the question as to whether the will of the State is in fact the true moral standard.

We may, therefore, define a right without regard to the theory adopted, as the jural or rightful liberty, or power to act in a particular case or class of cases.

There is implied in the term "jural liberty," or *right*, a corresponding duty upon others toward the owner of the right—that is to say, upon all others the general negative duty of not interfering with the exercise of the right; and, in the case of a right *in personam*, also a specific duty or obligation upon some particular person.[1] In either case, however, the right consists in a quality of the owner, namely, his liberty or power to act, and the corresponding duty upon others is a mere consequence of this quality in the owner.

In the case of a right *in personam*, the act which the owner of the right has the liberty or power to perform is to compel the obligor either to act or to forbear from acting; and there is, therefore, necessarily implied in it a power or control over the obligor. Hence, certain jurists, taking their notion from this class of rights, define a right as consisting in control or power over others.

Thus, Austin says: "A person has a right, when the law authorizes him, to exact an act or forbearance;" and, accordingly, he defines a right to be "the capacity or power of exacting from another acts or forbearances."[2]

And to the same effect is Amos, who defines a right to be "a measure of control delegated by the supreme political authority of a state to persons thereby said to be vested with a right over the actions of other persons said to be made thereby liable to the performance of a duty."[3]

And also Holland, who defines a right (or, as he calls it, a legal right) as "a capacity residing in one man of controlling, with the assent or assistance of the State, the actions of others;" and he accordingly asserts that "that which gives validity to a legal right is, in every case, the force which is lent to it by the State."[4]

The most serious defect of these definitions is that they regard rights as consisting, not in *jural* power, or power which it is right for one to have, but in *legal* power, or power which it is the will of the State that he should have, and consequently as mere creatures of the legislative will. But, independently of this, it is evident that these definitions are inapplicable to rights *in rem*; for it is irrational to say

[1] It is, therefore, as impossible for rights to conflict as for two bodies to occupy the same space at the same time. Hence, the absurdity of Hobbes's notion, that in a state of nature all men have a right to all things, including the persons of their neighbors.

[2] Austin, Jur. 410. [3] Amos, Jur. 79. [4] Holland, Jur. 62.

that one's right in himself, or in his wife, or child, or property, consists in control or power over the billion of people, more or less, who inhabit the globe. The non-interference of others with the exercise of the right is indeed essential to its enjoyment; but this non-interference is secured with regard to the mass of mankind by distance or other physical obstacles, and would be more perfect if there were no one in the world to interfere with it. Hence these definitions, however appropriate to rights *in personam*, are inadequate as definitions of rights in general.

Accordingly, both Austin and Amos elsewhere take a different view.

"Liberty, or freedom to deal with an external subject," says the former, "seems to be equivalent to right to deal with it. On the whole, right and liberty seem to be synonymous, either meaning, first, permission on the part of the sovereign to dispose of one's person or of any external subject; . . . secondly, security against others for the exercise of such liberty." [1]

"The generic expression," says Amos, "which denotes, for any given age or country, the exact measure of personal liberty for every man, which implies the most favorable condition for the highest possible development of the moral existence of all, is rights." [2]

The former of these definitions is objectionable in placing the limit to the rightful liberty of the individual in the arbitrary will of the sovereign; and the latter, in assigning a limit altogether indeterminate. Both, however, agree in regarding right as consisting in liberty; and in this there seems to be a universal concurrence of opinion among jurists.[3]

Hobbes rightly regarded this conception of rights as the fundamental principle of jurisprudence, and accordingly adopted it as the foundation of his system; and to him, therefore, is due the credit of pointing out the true method of the science.[4]

[1] Austin, Jur. 367.

[2] Science of Law, p. 91.

[3] Thus, according to Hobbes, "nothing is signified by the word 'right' other than that liberty which every man has to use his natural faculties according to right reason;" or, as he elsewhere expresses it, "right consisteth in liberty to do or forbear." (*De Corpore Politico*, 2, 10, § 5; Leviathan, 1, 14.)

To the same effect is Puffendorf: "As for the term 'right,' it imports a power of acting granted or left free by the law. . . . Since a man has the power of doing all such things as can proceed from his natural abilities, except those which are forbidden by some law, right, therefore, in this sense denotes a liberty." (Puffendorf, 1, 6, § 3.) And this accords with Cousin:

"The limit of liberty is in liberty itself. Liberty is to be respected, provided that it injure not the liberty of another. I ought to let you do what you will, but on condition that nothing which you do shall injure my liberty. For then, by virtue of my right of liberty, I should feel myself obliged to repress the aberrations of your will, in order to protect my own and that of others. . . . The right of government expresses the right of all and of each. It is the right of personal defense transferred into public force to the profit of common liberty." ("The True, the Beautiful, and the Good," Lect. 15.)

And even Blackstone seems to have arrived at a partial perception of this fundamental truth: "The absolute rights of man" (under which head he includes "the right of personal security, the right of personal liberty, and the right of private property") "are usually summed up in one general appellation, and denominated the natural liberty of mankind." (1 Com. 125.)

[4] "When Leibnitz," says McIntosh, "in the beginning of the eighteenth century, reviewed the moral writers of modern times, his penetrating eye saw only two who were capable of reducing morals and jurisprudence to a science. 'So great an enterprise,' says he, 'might have been executed by the deep, searching genius of Hobbes,

The conception is strikingly developed by Herbert Spencer, in his "Social Statics," in which work he holds that all rights are derived from a single first principle, which he calls "the law of equal freedom." This principle is "that every man may claim the fullest liberty to exercise his faculties compatible with the exercise of like liberty by every other man;"[1] or, as he elsewhere expresses it, "every man has freedom to do all that he wills, provided that he infringes not the equal freedom of any other man."[2] Accordingly, he says: "Rights are nothing but artificial divisions of the general claim to exercise the faculties—applications of that general claim to particular cases; and each of them is proved in the same way by showing that the particular exercise of the faculties referred to is possible without preventing the like exercise of faculties by other persons."[3]

Mr. Spencer assumes that the only limit to the rightful liberty of the individual is in the equal liberty of others, while Hobbes and Austin place this limit in the will of the government. In the definition I have given, it will be observed, neither the one nor the other of these limits is adopted, but rights are defined as consisting in the aggregate simply of the liberty which one *ought to have*, or which *it is right he should have*, leaving for the future the investigation of what its precise extent may be—which is in fact, as we shall see, the ultimate problem presented by jurisprudence.

CHAPTER II.

DEFINITION OF RIGHTS CONTINUED, AND HEREIN OF THE STANDARD OF RIGHT AND WRONG.

AS the term "a right" includes in its signification, or connotes, the idea of rightness, it would seem to be necessary, in order to render our definition of rights complete, to define the adjective "right," or the term "right," as used to denote a quality; but to do this would involve the solution of a problem which, in the present state of ethical science, perhaps cannot be solved, namely, the metaphysical problem as to the nature of right and duty—a question about which the theories of philosophers widely differ.

This problem, indeed, together with the psychological problem as to the nature of the faculty by which men perceive the right, and recognize the duty of conforming to it, belongs rather to the *philosophy of morality* than to morality itself, the province of which is confined to determining the practical problem as to what things are right

if he had not set out from evil principles, or by the judgment and learning of the incomparable Grotius, if his powers had not been scattered over many subjects, and his mind distracted by the cares of an agitated life.'' (Diss. on Prog. of Ethical Philosophy.)

[1] "Social Statics," ch. 4, § 3.

[2] *Id.* ch. 6, § 1.

[3] *Id.* ch. 15. We know of no other work in which the principle of liberty, and the derivation of rights from it, are so strikingly illustrated as in this. Some startling conclusions are arrived at, but these result mainly from the assumption that the principle of equal liberty constitutes the sole first principle of right. We may, therefore, regard the views maintained in the work referred to—as the author himself seems now to regard them—as inadequate, rather than incorrect. (See "Social Statics," preface.)

and what wrong; or, in other words, to determining the presence or absence of the quality—a problem which evidently may be solved without defining the nature of the quality, or explaining how we perceive it, and which to some extent must be solved before these questions can even be considered. For in this as in other branches of science, the perception of the phenomena to be accounted for must precede the consideration of their nature, and of the manner in which they are perceived; for had not men first perceived right and wrong, and felt the force of duty, obviously no questions ever could have risen upon these points.

It has been well observed, therefore, that morality and the philosophy of morality bear the same relations to each other as geometry and the philosophy of geometry; and that, as it was necessary that a body of geometric truth should be developed before the metaphysical and psychological problems as to the nature of geometric truth and of the faculty by which it is perceived could be considered, so morality comes before moral philosophy in the order of investigation.[1]

Hence it is, that while moral philosophy has furnished a battle-ground for conflicting theories since the dawn of philosophy, there has always been, at least among civilized nations, a substantial agreement as to the principles of morality. Thus, no one can contemplate the crime of murder without disapprobation; or, to refer to less extreme cases, there are none who will deny the obligation of returning a deposit, or of compensating for an injury, or of repaying a loan. For these propositions are universally admitted, and, indeed, by common consent furnish the crucial test by which all theories of moral philosophy are judged—the partisans of all striving to show that their respective theories account for the common moral convictions of mankind.[2]

[1] "Morality, and the philosophy of morality, differ in the same manner and in the same degree as geometry and the philosophy of geometry. Of these two subjects, geometry consists of a series of positive and definite proportions, deduced one from another in succession by rigorous reasoning, and all resting upon certain definitions and self-evident axioms. The philosophy of geometry is quite a different subject; it includes such inquiries as these: Whence is the cogency of geometrical proof? What is the evidence of the axioms and definitions? What are the faculties by which we become aware of their truth?—and the like. The two kinds of speculation have been pursued for the most part by two different classes of persons, the geometers and metaphysicians; for it has been far more the occupation of metaphysicians than of geometers to discuss such questions as I have stated—the nature of geometrical proofs, geometrical axioms, the geometrical faculty. And if we construct a complete system of geometry, it will be almost exactly the same, whatever may be the views we take on these metaphysical questions. . . . It has long appeared to me that the relation which thus subsists between geometry and the philosophy of geometry must subsist also between morality and the philosophy of morality. If we had a view of morality in which moral propositions were deduced from axioms by successive steps of reasoning, so far as to form a connected system of morality, we should then have before us definite problems, if we proceed to inquire what is the nature and evidence of moral axioms, and what are the faculties by which we know them to be true? On this account, it seemed to me that the construction of elements of morality ought to precede any attempt to settle the disputed and doubtful questions which are regarded as belonging to the philosophy of morality." (Whewell, "Elements of Morality," preface.)

[2] Thus we find the principle of the obligation to return a deposit assumed, without hesitation, by the little judge in the story of *Ali Cogia*, in the "Arabian Nights;" and the youngest hearer to whom the story is related never requires to have it explained to him that such was the law. "The obligation to return a deposit faithfully was, in very early times, holden sacred by the Greeks, as we learn from the story of Glaucus, who, on consulting the oracle, received this answer: that 'it was criminal to

The jurist, therefore, is not concerned with the conflicting theories of moral philosophy, but with morality only, and with that only so far as it treats of rights. It is, therefore, as we have observed, immaterial to the validity of our reasoning what theory we may adopt on this point, provided only we assume the reality of moral distinctions and the possibility of perceiving them; the former of which is attested by the common consciousness, and the latter by the common experience, of mankind, and both of which are necessarily assumed in all theories of morality, properly so called. Hence, we do not attempt to define the term "Right," in this connection, otherwise than by saying that we use it in its ordinary acceptation, as denoting a universal and apparently necessary conception of the human mind, leaving to the reader to adopt such definition as he may prefer.

But while it is not practicable, at this time, to give a perfect or essential definition of the term, right, in this connection, it is not impracticable to determine the common test or standard of right and wrong by which men are, in fact, habitually governed, or to show that this should, and must be, accepted as the paramount standard in all matters of common concern.

This problem, though susceptible of a complete solution, is extremely subtle and hard to grasp, and will therefore require a somewhat extended consideration.

Its solution, I think, may be given in the three following propositions:

1. The practical test or standard of right and wrong, to every man, is his own conscience.

2. The common moral convictions, or concurring consciences, of the people, or, in other words, *positive* morality, is the common test or standard by which questions of common concern are practically to be determined.

3. The ultimate test or standard is *scientific* morality, by which the principles of positive morality are, in the main, demonstrated to be true, and, at the same time, its errors and defects corrected.

It will be necessary, therefore, to explain the nature of conscience, and of positive or practical, and of scientific or theoretic morality.

harbor a thought of withholding deposited goods from the owners who claimed them.' And a fine application of the universal law is made by an Arabian poet contemporary with Justinian, who remarks that 'life and wealth are only deposited with us by our Creator, and, like other deposits, must, in due time, be returned.'" (Jones on Bailments, 59, 60, citing Herodotus, 6, 62; Juv. Sat. 13, 199.)

"Moral truths, considered in themselves, have no less certainty than mathematical truths. The idea of a deposit being given, I ask whether the idea of faithfully keeping it is not necessarily attached to it, as to the idea of a triangle is attached the idea that its three angles are equal to two right angles. You may withhold a deposit, but in withholding it do not believe that you change the nature of things, nor that you make it possible for a deposit to become property. These two ideas exclude each other. You have only a false semblance of property, and all the effects of passion, all the sophisms of interest, will not reverse the essential difference. This is the reason why moral truth is so troublesome; it is because, like all truths, it is what it is, and does not bend to any caprice." (Cousin, "The True, the Beautiful, and the Good," Lect. 14.)

It is one of the most serious errors of the theory of utility, as asserted by Bentham and Austin, that it denies all authority to the common moral convictions of mankind. "As for the moral sense," says the latter, "innate practical principles, conscience, they are merely convenient cloaks for ignorance or sinister interest." (1 Austin, Jur. 221.) The opinion of Burke was wiser—that the world would fall into ruin "if the practice of all moral duties and the foundations of society rested upon having their reasons made clear and demonstrative to every individual." (Morley's "Life of Burke," 17.)

There is, in some way, generated in every man, as it were, a code of moral convictions or principles, by which, in ordinary cases, he instantaneously and without reflection judges his own actions and those of others to be right or wrong. There is also in every man a faculty—whether innate or acquired it is unnecessary here to inquire—by which he perceives the duty or moral necessity of conforming to the right. This perception is also accompanied by certain sentiments—as, for instance, the sentiment of approbation or disapprobation with regard to his own actions or those of others, and, with regard to the former, the sentiment of conscious rectitude or of remorse. The combination of these moral convictions, with the faculty of perceiving the duty of conforming to them, and the accompanying sentiments, together constitute what is called conscience; the existence of which, whatever controversies there may be as to its nature, cannot be denied. And it is this which constitutes to every man the practical standard of right, or test of right and wrong, by which his conduct is, or ought to be, governed. Men, however, acquire their moral convictions, to a great extent, from education and association with others; or, in other words (as is indicated by the etymology of the term "morality" and kindred terms), from custom and habit. Hence, every aggregation of people brought together by any principle of association—as, for instance, by common locality, nationality, profession, social intercourse, or otherwise—have a morality to some extent peculiar to themselves. Thus the moral principles of one age or nation are somewhat different from those of another, and the same is true of different neighborhoods, professions, and classes of society in the same age and nation, and even of different families. In addition to this, the morality of each individual is, to some extent, modified by his own peculiar character, moral and intellectual. Under all this diversity, however, there is a substantial conformity in respect to fundamentals; and especially in every nation or people there is always a body of moral principles covering the whole field of practical duties, and universally, or almost universally, recognized, which becomes embodied in the language and habitual thought of the people, and wrought, as it were, into the conscience of nearly every individual. It is this which constitutes the positive or received morality (*mores*, or, as the Greeks called it, *νόμος*) of a nation or people; and in this we have a common standard, or test, by which the question of right or wrong is habitually judged, and to which men, by a spontaneous impulse of their nature, involuntarily submit; for those moral principles which are common to all, or nearly all, have in general an authority and power over the conscience of each individual infinitely superior to those convictions which are peculiar to himself alone; for the conscience is made up, not only of intellectual convictions, but also of moral sentiments, which, though to some extent natural, yet (as the etymology of the term "conscience" would seem to indicate) derive their chief force from sympathy and general acceptation.[1]

[1] According to Hobbes, it is this that constitutes conscience. "Two or more men," he says, "are conscious of a thing when they know it together (*conscire*). Hence arises the proper meaning of conscience; and the evil of speaking against one's conscience in this sense is to be allowed. Two other meanings are metaphysical—when it is put for a man's knowledge of his own secret facts and thoughts, and when men give their own new opinions, however absurd, the reverenced name of conscience."

Hence, the positive morality of a people not only enters into and forms part of the conscience of each individual, but generally carries with it an unquestioned supremacy.[1]

Nor can it be doubted that, in all matters of common concern, this should be held to be of paramount authority; for, as no reason can be asserted why one man's conscience should be a guide to another, it follows that, in all questions between men, we must resort to the common conscience as the practical test of right and wrong. Only in proportion to the development of this *consensus* of moral opinion—the positive morality, or conscience of a people—is free government possible; and between the rule of this moral force and absolute or despotic power there is no alternative. Hence, Hobbes and Austin and their followers, in failing to perceive this important and fundamental truth, were logically drawn to assert that the will of the Government is itself the criterion of right and wrong—of the just and the unjust; and thus, to use the expressive language of Hobbes, to create, as it were, "a mortal God upon earth."

It is hard, indeed, to formulate our proposition in precise terms; but it is, nevertheless, a truth which has impressed itself upon the minds of all candid inquirers into the mysteries of the philosophy of human nature, and which in different forms has been very generally asserted by jurists and phllosophers.

It is forcibly and eloquently set forth by Mr. Grote in the passage quoted in the last note, and the other passages there referred to, and by Plato in the "Protagoras" and elsewhere.

It is asserted also in the proposition, generally received by all

(Bain, "Moral Science," 132.) It may be said of this derivation of the term that, if not true, it is at least *ben trovato*.

[1] "The customary morality—that which education and opinion have consecrated—is the only one that presents itself to the mind with the feeling of being *in itself* obligatory." (Mill, "Utilitarianism," ch. 3, pp. 38, 39.)

"This aggregate of beliefs and predispositions to believe—ethical, religious, æsthetical, social, respecting what is true or false, probable or improbable, just or unjust, holy or unholy, honorable or base, respectable or contemptible, pure or impure, beautiful or ugly, decent or indecent, obligatory to do or obligatory to avoid, respecting the status and relations of each individual in the society, respecting even the admissible fashions of amusement and recreation—this is an established fact and condition of things, the real origin of which is for the most part unknown, but which each new member of the society is born to and finds subsisting. It is transmitted by tradition from parents to children, and is imbibed by the latter almost unconsciously from what they see and hear around, without any special season of teaching or special persons to teach. It becomes a part of each person's nature—a standing habit of mind or fixed set of mental tendencies, according to which particular experience is interpreted and particular persons appreciated. . . . '*Nomos* (Law and Custom) King of All,' to borrow the phrase which Herodotus cites from Pindar, exercises plenary power, spiritual as well as temporal, over individual minds, molding the emotions as well as the intellect according to the local type, determining the sentiments, the belief, and the predisposition in regard to new matters tendered for belief, of every one; fashioning thought, speech, and points of view no less than action, and reigning under the appearance of habitual, self-suggested tendencies. Plato, when he assumes the function of constructor, establishes special officers for enforcing in detail the authority of *King Nomos* in his own Platonic variety. But, even where no such special officers exist, we find Plato himself describing forcibly, in the speech assigned to Protagoras, the working of that spontaneous, ever-present police by whom the authority of *King Nomos* is enforced in detail—a police not the less omnipotent because they wear no uniform and carry no recognized title." (1 Grote: "Plato," 378–382.)

See, also, the numerous authorities and illustrations cited in the notes to the passages quoted; also Mr. Carpenter's work on Mental Physiology, where the above passages are quoted, and the facts stated physiologically explained.

competent students of history, that men and States are in the long run controlled by public opinion.[1]

It is involved also in the proposition, almost universally asserted by jurists, that custom is the foundation of the law, or rather is in fact the law; though the proposition thus stated is open to the objection that it does not distinguish between those customs which are accompanied by a conviction of their moral rectitude (or, in other words, positive morality) and those which are regarded as morally indifferent. It would be more accurate, therefore, to say that the law rests upon morality and custom (*moribus consuetudinibusque*).

The proposition is also implicitly asserted, in the description of the *jus gentium* or *jus naturale* by the Roman lawyers, as that law "which is observed generally by all peoples," or "which all nations use."

And, indeed, it is involved in the very conception of justice and morality, which by all minds are conceived as something generally known and recognized as obligatory.

It is also to be observed, not only that the consciences of individuals concur in the general conscience of the nation or people to which they belong, but also that there is a substantial agreement, as to fundamentals, in the positive morality of all civilized nations, ancient and modern, and a considerable degree of conformity even among uncivilized and barbarous peoples.[2] And this indicates that positive morality is not accidental, either in its nature or development, but that it is in the main the natural outgrowth of human nature, under the varying circumstances in which it may be placed; and that, though modified by accidental causes, it is founded upon the nature and natural relations of men and things.

On the other hand, in view of the difference in morality of different peoples and ages, and of different classes and individuals in the same age and country, it is evident that positive morality cannot be

[1] Nothing appears more surprising, to those who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few, and the implicit submission with which men resign their own sentiments and passions to those of their rulers. When we inquire by what means this wonder is effected, we shall find that, as *force* is always on the side of the governed, the governors have nothing to support them but *opinion*. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military government as well as to the most free and most popular. The soldan of Egypt or the emperor of Rome might drive his harmless subjects, like brute beasts, against their sentiments and inclinations, but he must at least have led his mamalukes or prætorian bands, like men, by their opinion." (Hume, "Essays," 4.)

"Though the habit, general in past times, of regarding the powers of governments as inherent, has been, by the growth of popular institutions, a good deal qualified, yet, even now, there is no clear apprehension of the fact that governments are not themselves powerful, but are the instrumentalities of a power. This power existed before governments arose; governments were themselves produced by it; and it ever continues to be that which, disguised more or less completely, works through them. . . . That which, from hour to hour, in every country governed despotically or otherwise, produces the obedience making political action possible, is the accumulated and organized sentiment felt toward inherited institutions made sacred by tradition. Hence, it is undeniable that, taken in its widest acceptation, the feeling of the community is the sole source of political power—in those communities, at least, which are not under foreign domination. It was so at the outset of social life, and it still continues substantially so." (Herbert Spencer.)

[2] One of the most striking illustrations of the substantial conformity of the moral notions of mankind, is the stress laid upon their occasional diversity—as, for instance, by Herodotus, Montaigne, and others.

accepted as infallible. Hence, the ultimate standard of right is to be sought in reason, or scientific morality.[1]

With regard to scientific morality, two processes are obviously involved; namely, to determine the first principles of the science, and to deduce from them their legitimate logical consequences.[2]

With regard to the former, it is perhaps impossible, in the present state of ethical science, to lay down the ultimate first principles of morality; but we may, by a process of induction, ascertain what are the fundamental principles upon which the common moral convictions of mankind in fact rest; and these, having been determined and accurately defined, may, at least provisionally, be accepted as the first principles of morality. As to the nature and sufficiency of the proofs upon which these principles rest, it does not fall within the scope of our work to inquire; but our task will be sufficiently accomplished if we show that the principles of morality, or rather of that branch of morality which treats of rights—with which alone we are at present concerned—are in fact derived from certain fundamental principles, or notions of right, established in the common moral convictions of mankind.

According to this conception of the two subjects, positive in the main coincides with scientific morality, but differs from it in its method, and, in some degree, its results. It lacks scientific precision in the formulation of its principles, and hence does not admit of an equally rigorous logic; for where premises are only approximately, and not accurately, true, often the deductions from them must be absurd, and the deductions from different principles conflicting. Hence it often becomes necessary to limit the effect of its principles by exceptions; and in this way a result only approximately correct is reached. Its rules, therefore, are not deduced by accurate logical deductions from its principles, but are in part arrived at by a rough kind of induction or experiment.

Scientific morality, on the other hand, accepts no principle except as universally true, both immediately and in all its logical results, and admits no conclusions except such as can be rigorously demonstrated from the principles assumed. It is, therefore, a true deductive science, as certain in its method and in its results as that of geometry—or, to take a more nearly related instance, that of political economy; that is to say, it cannot, in the present stage of its development, assert the absolute truth of its conclusions, but it may at least assert with absolute certainty that those conclusions follow necessarily from its assumed first principles.

As we have observed, however, the principles of scientific morality cannot become practically operative as a common rule or standard of right and wrong, until they meet with a general acceptance, and become established in the common moral convictions of the people.

[1] "What appears, as it were, prelusively, unconsciously, and imperfectly in the one (the historical development) is, in the other (the philosophical development), modified and expanded under the dominating principle of the *Begriff*, by a reflective and self-conscious process." (British Quart. Rev., p. 81. July, 1878.)

[2] As to the possibility of a moral science, see Locke "On the Understanding," Bk. 4, Ch. , §§ 18-20, from which we extract the following: "Confident I am that if men would, in the same method, and with the same indifferency, search after moral as they do mathematical truths, they would find them to have a stronger connection one with another, and a more necessary consequence from our clear and distinct ideas, and to come nearer perfect demonstration than is commonly imagined."

The practical end of scientific jurisprudence is, therefore, to enlighten the general conscience, and to correct and reform the moral convictions of mankind. To use the striking metaphor of Pindar, Nomos alone is King, and the function of Philosophy is only to advise.

CHAPTER III.

OF THE METHOD AND FIRST PRINCIPLES OF RIGHT.

ACCORDING to our definition, a right consists in the jural or rightful liberty to act (*facultas agendi*) in a particular case or class of cases. Rights, therefore, are but particular parts or divisions of the general liberty to which a man is rightfully entitled, and in the aggregate constitute such liberty. The ultimate problem presented by right, or theoretical jurisprudence, is, therefore, to determine, in view of all existing facts, including laws and customs, the extent of the rightful liberty of the individual.

But, obviously, this liberty exists in every case in which one may not rightfully be restrained by other individuals or the State; and as in general this liberty exists, and there is always a presumption in its favor, the immedlate problem is to determine the exceptional cases in which it may be rightfully restrained.

In determining this problem, the following propositions may be assumed as either self-evident or as readily demonstrable. These, for convenience of reference, are numbered, and, to distinguish them from argumentative and explanatory matter, also italicized:

(1) The rightful power to coerce or restrain the free action of another, where it exists, like the power to do any other act, is *ex vi termini* a right; and it follows, therefore, *that the rightful liberty of the individual is limited, and limited only, by the rights of other individuals or of the State*—the former of which are called *private*, and the latter *public*, rights.

(2) *The presumption in favor of liberty can be overcome only by proof of the existence of some right, private or public, derogating from it; and the burden of proof is always on him who asserts the existence of such a right.*[1] In this respect no distinction can be made between public and private rights; but where a right is asserted, either in an individual or the State, which derogates from the liberty of others, it cannot be admitted, unless a sufficient reason can be given for its existence.

The limit imposed by the rights of the State upon the liberty of the individual will be considered in a separate chapter. For the present it will be sufficient to say that the rights of individuals, as between themselves, are but little affected by the rights of the State; and, therefore, whatever theory be adopted as to the extent of the rights, or rightful power, of the State, the doctrine of Private Right will remain very much the same. This is illustrated by the substantial identity of the doctrine of rights in the Roman and in the English

[1] "There is always a reason against every coercive law—a reason which, in default of any opposing reason, will always be sufficient in itself; and that reason is, that such a law is an attack upon liberty." (Bentham, "Theory of Legislation," pt. 1, ch. 1.) "The laws of England, in all cases, favor liberty." (Jacobs, Law Dict., "Liberty.")

law, though the one was under a free, and the other under a despotic, government.[1]

(3) The existence of a right in any one derogating from the liberty of another cannot be affirmed, unless it can be equally affirmed of all others standing in the same jural relations; for the burden of proof lies on him who asserts the existence of such a right; and, according to the hypothesis, it is impossible to assign any reason why such a right should exist in one which would not, in a like case, exist in another.

The proposition, therefore, resolves itself into this: *that the jural liberty of all men in the same case is equal*—which is the same thing as to say that restraint cannot be rightfully imposed upon any one, unless it may be equally imposed on others *in the same case;* the term "the same case" meaning a similarity of circumstances material to the question of right. Thus the circumstance of infancy or of mental unsoundness clearly distinguishes the case of the infant or *non compos* from that of the ordinary man. So the circumstance that one has manufactured an article of personal property clearly distinguishes that article from others. Obviously, however, this principle can have no application to the rights of the State, which stands in a case peculiar to itself.[2]

(4) The liberty to exercise the faculties necessarily implies the acquisition of unequal powers or rights—as, for instance, by the acquisition of property; and it cannot, therefore, be affirmed that the jural liberty—or aggregate of rights—of all men is equal. We may, however, distinguish between the original rights of mankind—or those resulting from the mere event of birth—and those acquired by the labor or personal exertion of the owner of the right, or of his predecessors; and, having the former in view only, it may be affirmed *that the original jural liberty of all men of normal status* is equal.

(5) It is an obvious consequence, from the nature of a right, *that one who has been unjustly deprived of its exercise should be restored to its enjoyment;* and it seems equally obvious that, *where restitution in kind is impracticable, restitution in value or compensation should be made.*

It is universally, or almost universally, assumed that men may be rightfully compelled to perform their promises.[3] But, in view of the numerous admitted exceptions to this proposition, it is evident that this cannot be asserted as universally true, and therefore cannot be admitted as a principle of rational jurisprudence. And, in fact, it will be shown hereafter that obligations arising from promises or executory contracts rest, like those arising *ex delicto*, upon the principle stated in Proposition 5.

[1] "It was a maxim of the Roman law, *Quod principi placuit legis habet vigorem*—a doctrine altogether repudiated by English lawyers, from Bracton downward." (1 Spence, Eq. Jur. 125; Fortescue, *De Laudibus Legum Angliæ*, c. ix.)

[2] Restraint may be rightly imposed upon the individual either for his own benefit—as in the case of mental incompetency resulting from infancy, old age, or insanity—or for the benefit of others, as in the case of ordinary obligations. Whether restraint upon the former grounds should be limited to cases where absolute necessity requires it, or, if not, what are the limits to be assigned to it, are questions indeterminate in their character, and which must, therefore, within certain limits, be determined by custom or by legislation. Such right is, however, obviously limited by the principle itself to cases where such interference is for the benefit of the party restrained; and cases of this kind, as they rest upon the fact that the individuals to which they apply are distinguished from men in general by personal peculiarities, are exceptional in their character. They may, therefore, be omitted from consideration.

[3] This is expressed in the maxim of the Roman law: *Pacta quælibet servanda sunt.*

6. Obviously *all rights of property, not fiduciary in their character, may be transferred from one to another by contract.*

7. *And the same proposition would seem to be true of all obligations, so far as they may be transferred without increasing or materially altering the burden resting on the obligor.*

Custom is an important element in the determination of rights, into which it enters in three ways:

First, where men enter into a contract, it is obvious that they generally have regard to any existing custom relating to the matter about which they are dealing; and, to arrive at the intention of the parties, the contract must be construed with reference to the custom. In such cases, *customs enter into and form part of contracts, not on account of any particular virtue in them, but because of the presumed intention of the parties.* Hence, if the express terms of the contract are inconsistent with the custom, the latter is rejected. Thus, where it is the custom of the community that the tenant at the end of his lease shall be entitled to the crops growing on the leased premises, and to enter after the termination of the lease for the purpose of removing them, it is evident, where the lease does not refer to the matter at all, that it is the intention of the parties that the tenant shall have that right. But, if the lease expressly states that the lessor is to have the crops growing on the land at the expiration of the lease, the presumption that the parties intended conformity to it is rebutted, and the custom is accordingly rejected.

So, also, *custom may become an important element in the determination of rights arising from delict or injury.* Thus, where it is the custom for vehicles meeting each other on the road to pass each other to the right,[1] a party disregarding the custom is obviously responsible for any collision that may occur, not because of the mere disregard of the custom, but because such disregard indicates either gross negligence or willful intention to injure.

Accordingly, where the party damaged might easily have avoided the collision, but fails to do so—or, in other words, where he has been guilty of contributory negligence—he acquires no right; for, in such case, the damage is as much the result of his own fault as of that of the other party.

Lastly, general customs frequently have the force of laws; and this, perhaps, is their most important aspect. The efficacy of custom in this respect is sometimes attributed to the fact that it necessarily constitutes an expression of the general will; and certainly custom is a more perfect expression of the will of the State than laws, which are often in conflict with the general will. Hence, so far forth as rights may be determined by the will of the State, custom, as being a more perfect expression of that will, should have a superior efficacy to statutes. And, accordingly, this is practically the case; for, with regard to private rights, laws in general become operative only when they conform to an existing custom, or generate a new one; otherwise, they may for awhile, at the expense of infinite injustice and hardship, be imperfectly enforced; but ultimately they give way and become obsolete. And, as they become operative only by custom, so, too, they

[1] "In England the law of the road is that 'horses and carriages should pass each other on the whip-hand.' . . . The action in which this rule is applied, viz., for negligently driving a carriage by which any one is injured, is as ancient as the common law; but the uniform determination of the judges, that the non-observance of this rule is negligence, is of modern date." (1 Blackstone Com. * 74, note 14.)

cease to be operative, and are in effect repealed when the custom changes.[1]

It seems, indeed, part of the very nature and constitution of man that his actions shall, in the main, be immediately determined by custom and habit; and hence—using the term in its widest sense, as including not only simple customs, but also those which are accompanied by a conviction of their moral rectitude (*mores consuetudinesque*)—morality itself (and jurisprudence as a branch of morality) depends mainly upon custom for its practical operation; though it is the function of morality as a science to judge of the rectitude of customs, and as an art to correct and reform them.[2]

(8) Custom, however, is not conclusive in the determination of rights, but its efficacy is confined to matters jurally indifferent. Thus the custom spoken of by Blackstone, by which the landlord claimed the right of concubinage with the tenant's wife on the wedding-night,[3] if in fact it ever existed, gave rise to no right in the landlord,

[1] "It is the nature of the law to be realized in practice. A principle of law never applied in practice, or which has lost its force, no longer deserves the name; it is a worn-out spring in the machinery of the law, which performs no service, and which may be removed without changing its action in the least. This applies, without limitation, to all parts of the law—to the law of nations as well as to private and criminal law; and the Roman law has given it its express sanction, inasmuch as it considers *desuetudo* as an abrogation of a law." (Ihering, "Struggle for Law," 65.)

"Les lois conservent leur effet, tant qu'elles ne sont point abrogées par d'autres, ou qu'elles ne sont point tombés en désuétude. Si nous n'avons pas formellement autorisé la mode d'abrogation par la désuétude, ou le non usage c'est qu'il eût peut-être été dangereux de le faire. Mais peut on se dissimuler l'influence et l'utilité de ce concert délibéré, de cette puissance invisible, par laquelle sans secousse, et sans commotion, les peuples se font justice des mauvaises lois, et qui semblent protéger la société contre les surprises faites au legislateur, et le legislateur contre lui-même." (*Discours Préliminaire*, cited by Sedgwick, "Stat. and Const. Law," 97.)

"Inveterate custom is, not erroneously, observed as law (and this is the law which is said to be *moribus constitutum*). For since laws themselves bind us from no other cause than that they are received by the judgment of the people, rightly also those which, without any writing the people have approved, shall bind us. For what difference is there whether the people declare their will by suffrage or by acts? Wherefore, most rightly, it is also received that laws are abrogated, not only by the vote of the legislature, but also with the tacit consent of all by *desuetude*." (Dig., 1, 3, 32; see, also, 1 Blackstone, Com. *74.)

It may be interesting, in this connection, to refer also to the Spanish law, which is substantially to the same effect. "Legitimate custom has the force of law, not only where there is no law to the contrary, but also to derogate from an anterior law opposed to it; whence comes the saying, 'There is a custom *outside* of the law, *against* the law, and *according to* the law' (*fuera de la ley, contra la ley, y segun la ley.*'" (Escriche, Dict. de Leg., "Costumbre)." This instance is the more striking from the fact that, in theory, the Spanish law is supposed to be altogether *lex scripta*, Spain being emphatically a code-cursed country—having, from the earliest period of its history, been governed by written codes. The assertion, therefore, made by Mr. Austin, that custom becomes operative in the determination of rights only when adopted by the political power, or, in other words, only when it becomes law (in the strict sense), cannot be maintained; but it will be nearer the truth to say that law becomes operative only when it becomes custom, and for so long only as it continues to be so.

[2] "Customs are made by time and usage, and do obtain the force of laws in particular places and nations; but not otherwise than upon the supposition that they were reasonable at the beginning." (3 Mod. Rep., preface.) The author, as an example of an unreasonable custom, refers to the tenure of Borough English, the origin of which he explains, as stated by Blackstone in the note to the following paragraph. "Custom to Puchta is nothing but a mere mode of discovering what conviction as to the legally (*i. e., jurally*) right is." (Ihering, "Struggle for Right," 14.)

[3] "The principal and most remarkable of which [customs] is that called 'Borough English,' . . . viz: that the youngest son, and not the eldest, succeeds to the

but was a mere instance of successful oppression; and the same remark is true of many of the feudal customs which are better authenticated. Hence, customs enter into the determination of rights only as an element in the problem, and their effect, like that of laws, is determined by independent principles of right.

(9) Nearly all questions as to rights (as will be shown more fully hereafter) may be determined by the above principles. Where doubtful questions arise which cannot be so determined, the principle of utility must be resorted to; for all theories of right unite in the proposition that conformity to right must conduce to the welfare of mankind; and utility, or tendency to promote that welfare, may therefore be assumed to be, if not of the essence, at least a property, of right, and therefore universally to be affirmed of it. *It therefore follows that nothing which is pernicious or contrary to utility can be right.*[1]

The principle of utility, in the negative form in which I have stated it, is embodied under the name of the *argumentum ab inconvenienti* in one of the fundamental maxims of our law; and there are few principles more frequently referred to and relied upon by jurists than this. The maxim as given by Coke is, *Argumentum ab inconvenienti plurimum valet in lege;* and he adds: "The law, that is, the perfection of reason, cannot suffer anything that is inconvenient;" and therefore he says: "*Nihil quod est inconveniens est licitum;*" and that "judges are to judge of inconveniences as of things unlawful."

But in considering the question of inconvenience, however, regard must be had, not to particular, but to general, consequences; or, in other words, not to the effect of the decision in the particular case under consideration, but to its effect as a precedent.[2] This is but an application of another principle, which may be thus stated:

(10) What is right or wrong, just or unjust in any case, must necessarily be so in other like cases. Hence right, as well as morality generally, must consist of general rules applying to all cases of the same class. This is insisted upon by all moralists, and is but a different statement of Kant's "Categorical Imperative."[3]

burgage tenement on the death of the father. For which Littleton gives this reason: because the younger son, by reason of his tender age, is not so capable as his brethren to help himself. Other writers have, indeed, given a much stranger reason for this custom—as, if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding-night, and that, therefore, the tenement descended, not to the eldest, but to the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*) till abolished by Malcolm III." (2 Blackstone, Com. 83.)

[1] The wisdom of men, however, is not always, or even generally, adequate to judge truly as to the utility of any given principle; and the question of right is generally more simple than that of utility. Wherever a principle of right is otherwise established, the question of utility cannot be considered. In such cases, we know it is useful because it is right.

[2] "You cannot permit one action and forbid another without showing a difference between them; consequently, the same sort of actions must be generally permitted or generally forbidden. Where, therefore, the general permission of them would be pernicious, it becomes necessary to lay down and support the rule which generally forbids them." (Paley, "Moral and Political Philosophy," Bk. II, Ch. vii.)

[3] "Act according to a maxim which can likewise be adopted as a universal law." ("Phil. of Law," translated by Hastie, 34.)

CHAPTER IV.

OF THE LIMIT TO THE LIBERTY OF THE INDIVIDUAL IMPOSED BY THE RIGHTS OF THE STATE.

§ 1. *Of Rights of the State Generally.*

THE rights or powers of the State are usually summed up under three heads, namely: (1) The Judicial Right, or right of jurisdiction; (2) the Legislative Right, or right of legislation; and (3) the Executive Right, or the right of enforcing the judgment or the will of the State, as the case may be.

It is only by the exercise of the first two rights that the principles of private right can be affected; and it will be sufficient, therefore, to consider these only.

§ 2. *Of the Right of Jurisdiction.*

Jurisdiction is commonly defined to consist in the power to hear and determine particular controversies between individuals and the State,[1] or to administer justice in such cases[2]—a definition sufficiently accurate when applied to officers of the State, but inadequate when applied to the State, or Government itself. A more correct definition is suggested by the etymology of the term, according to which jurisdiction is the right or power of declaring the right (*jus dicere*), or of administering justice. This end involves the performance of two functions, namely: first, that of deciding actual controversies as they arise, or jurisdiction in the narrow sense of the term; secondly, and as preliminary to this, that of establishing in advance such rules of decision as may be necessary for the determination of such controversies—such, for instance, as the statute of frauds, the rule that written contracts cannot be varied by oral evidence, the rule *simplex commendatio non obligat*, and generally all rules prescribing or determining actions. Rules of this character, whether established by the legislature or by the courts, or by the force of judicial precedent or custom, may be called, for lack of a better term, *judicial* legislation, though the term *legislation* cannot, with strict propriety, be applied to them. For the function of establishing such rules is essentially identical in its nature with that of jurisdiction, and cannot be distinguished from it; for, in the performance of this function, the State simply decides cases by classes—by establishing rules for their decision in advance—instead of deciding particular cases as they arise. In either case, therefore, its function is essentially that of judge or umpire, and justice constitutes the only admissible rule of decision.

The function of judicial legislation is, therefore, a branch of the general function of jurisdiction, and differs in no essential respect from the ordinary jurisdiction exercised by the courts. The term "legislation" is appropriate to it only because this branch of jurisdiction is, in this country and elsewhere, to a considerable extent, anomalously exercised by the ordinary legislature; but, in view of the essential and fundamental difference existing between it and the function of legislation generally, it more appropriately belongs to the

[1] Rhode Island *v.* Massachusetts, 12 Peters, 557, 717.
[2] Jacobs, Law Dict., "Jurisdiction."

judicial department of Government, and should be exercised either by the ordinary courts, or by courts of extraordinary jurisdiction, or by a judicial commission, or department of justice, charged with the general supervision of the administration of the law of private right, and of the expression of that law, whether by laws or rules or by judicial decisions.

When this is effected—as, perhaps, at no distant day it may be—it will remove from the law an anomaly which at present is a source of great confusion; for in the present condition of things, though the law in theory is merely the science and the art of justice, yet in practice we are confronted with the obvious objection that the law administered by the courts is not, even in theory, merely justice, but that it includes also arbitrary enactments made by the legislature. The definition, however, is none the less true, and may be substituted with advantage for the definition we have given of the law of private right as the science or doctrine of actions. For the legislature, when it undertakes to establish principles for the determination of rights, is, in fact, exercising judicial functions, and must be considered, along with the courts, as part of the judicial department; but were this anomaly removed and all judicial power vested in one department, the law would then become, in fact as in theory, the art of justice, applied by men not vested with arbitrary power, but charged with the simple duty of administering justice, and of determining all questions by the application of the principles of right.

In this country, great progress has already taken place in this direction, for with us it has at least been attempted to distribute the powers of justice into co-ordinate and independent departments; and, while we have still left in our legislative department a power it ought not to possess, yet we have established principles which, in effect, greatly limit it, and which, in the end, must destroy it. These principles consist in the power of the courts to declare void unconstitutional laws, and in the constitutional provisions asserting the fundamental rights of life, liberty, and property, and forbidding the enactment of laws impairing the obligation of contracts. The rights thus provided for in effect include all vested rights whatever; and by these provisions, according to their true intent and meaning, all such should be protected from legislative attack, as well as from invasions from other quarters. And, accordingly, we see in the modern decisions the strongest tendency on the part of the courts to extend the operation of these constitutional provisions.

To a large extent, even as things now are, this function is, in fact, vested in the courts, and exercised by them by establishing such rules, either directly or by precedent; and we will complete our view of jurisdiction by briefly referring to each class.

§ 3. *Of Jurisdiction Continued, and Herein of Rules of Court.*

The power of establishing rules precisely similar to those enacted by the legislature has always been vested in and exercised by our courts. Such rules are designed merely to secure, or assist in securing, the just decision of questions of right; and it is an obvious principle that they should not be suffered to stand in the way of the very object for which they are established, namely, the administration of justice. Hence it is within the power of the courts to control the ap-

plication of such rules, and even to disregard them where they stand in the way of a just decision. For it is an established principle that the rules of the court are under its control, and "should be made to yield to the superior claims of justice."[1] The same principle, as we shall see, is also substantially true with regard to rules established by judicial precedent. Nor can it be doubted in principle—though, in the face of the false theory of the law so generally prevailing, it will doubtless sound paradoxical to assert it—that the same principle should be applied to such rules, even when established by the legislature. For such rules, whether established by the courts or by the legislature, are not expressions of the will of the State, but of its judgment in its judicial capacity; and it is essential that the power of relieving against them, and of supplying their defects,[2] should be vested somewhere in the Government. In the Roman law this power was vested in prætors, the ordinary judges, and, in our law, in the Chancellor or the courts of equity; but wherever it be vested, notwithstanding the prevailing opinion to the contrary, it is a power essential to the administration of justice, and without which the State must necessarily fail to realize its principal end.

§ 4. *Of Jurisdiction Continued, and Herein of Rules Established by Judicial Precedent.*

The rules of the law are in the main established by precedent, or judicial decision; but there cannot be a greater error than to suppose that the courts by whose decisions they are established perform a legislative function. For it is a maxim, not only of the law, but of reason, that it is the function of the judge to declare, not to make, the law (*judicis est jus dicere non dare*); and the maxim expresses precisely the principle upon which the development of the law has uniformly proceeded.

In every case, the immediate function of the court is to decide the particular case before it, and to decide it justly. But, in order that this may be done, the case must be determined by some general rule or principle;[3] and the effect of the decision is not, therefore, merely that a certain obligation rests upon the defendant in the particular case, but that such obligations arise in all cases of a like kind. The immediate effect is the determination of the particular controversy; and to this extent the judgment of the court, right or wrong, is final and conclusive. The judgment, however, has an ulterior effect. It involves the assertion by the court of a general rule as applicable to all similar cases, whether they have already occurred or are yet to occur. But, as to the general rule thus in effect declared, the judgment is not a declaration of the will of the court (or act of legislation, for which *voluntas stat pro ratione*), but it is, as its name expresses, merely the judgment of the court as to the existence of the rule of right asserted. In this aspect, therefore, the judgment is not conclusive as to what the law is. Naturally, it will carry with it a greater or less weight as authority according to the learning and ability of the judge, upon the principle *cuique credendum in sua arte;* and, on this

[1] People *v.* Williams, 32 Cal. 287.

[2] "*Potestatem tam subveniendi contra rigorem legis quam supplendi defectum legis.*" (Bacon, *De Aug. Sci.*, Ch. 8, App. 35.)

[3] Prop. 10, p. 74.

account, it will be entitled to the respectful consideration of other judges; and, when the question is doubtful or indeterminate, a regard to the obvious desirability of uniformity in the administration of justice will give it a still greater, and often a conclusive, effect; but nevertheless, if it is clearly erroneous, it is not law, and should be disregarded. Rules thus erroneously established do not, in any true sense, form part of the law; but they are called so, as the Roman lawyers used to say of the prætors' decisions, regard being had, not to what the judge decides, but to that which he ought to decide.[1]

In general, at least with average judges, the tendency is rather to a too great subservience to the authority of former decisions than otherwise; and from this, and the natural disposition of men to follow others, erroneous precedents are too frequently followed; and in this way there occurs a series or current of erroneous precedents, and a custom is generated. But even in such cases, except where the rule has entered into the course of business and habitual mode of action of the people, or, in other words, has become, not merely a custom of the courts, but of the people generally, the courts feel themselves at liberty to disregard it.[2]

Obviously, therefore, the rule of *stare decisis*, except so far as it enjoins upon the courts a decent and natural regard to the authority of other courts, greater or less, according to the ability and learning of the judges, rests merely upon the principle that custom should be observed; and hence, even where an erroneous rule is so firmly established as to become, for the time being, part of the law, it falls into desuetude when the custom changes. And thus it happens, as elsewhere explained, that the life of an arbitrary or accidental rule founded upon erroneous decisions is short. Such rules never endure.[3]

[1] 1 Blackstone, Com. 69, 70. The expressions of the commentator, and of lawyers generally, on this point are not always reconcilable; and it will be in vain to attempt to deduce from the authorities any clear and consistent rules. On this point the Roman jurists were divided into two parties, viz.: the Proculians and the Sabinians. With us, it is worse; for not only are our lawyers, according to the bent of their minds, and their familiarity with the law, divided into parties upon the same point, but, in the case of the great mass of them, each is divided in his own mind, and is accustomed habitually to assert, on different occasions, with regard to the effect of the decisions, the most extreme and contradictory views. Perhaps the best statement of the rule, as generally received, is, that in Callender's Administrator *v.* Ins. Co., 23 Pa. St. 474, from which we extract the following: "Do we violate the rule of *stare decisis* by now correcting the mistake, and going back to the well-established doctrine which that case has disturbed? If we do, we commit a greater error than the one we have felt bound to correct; for that doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government. But, like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes."

[2] "Even a series of decisions," says Chancellor Kent (1 Com. 47), "are not always conclusive evidence of the law, and the revision of a decision very often resolves itself into a mere question of expediency (or, rather, we should say, justice), depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it;" and, he adds, referring to the greatest of English jurists, Lord Mansfield, "Perhaps no English judge ever made greater innovations or improvements in the law, or felt himself less embarrassed with the disposition of the elder cases, when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England," he observed, "would be an absurd science, were it founded upon precedents only."

[3] Of this the history of our law presents innumerable instances; and books, and even libraries, might be filled with precedents, once firmly established and never overruled, which would provoke only ridicule if appealed to at this day.

To rules established by precedent, therefore, the same observation must apply as to rules of court expressly promulgated, viz., that, "being formed for the furtherance of justice, they should be made to yield to the superior claims of justice."[1]

§ 5. *Of the Right of Legislation.*

We come next to consider the right of legislation.

Laws or statutes are mere acts of men differing from other men only in being vested with the right of legislation; and obviously, therefore, whatever validity they may have, they derive from the right vested in the legislature over the matters to which they relate. Whenever, therefore, it is within the right of the legislature to determine any matter, the expression of its will with regard thereto is conclusive; and, hence, rights may originate in legislation, as in contract or tort, which the moralist as well as the lawyer must recognize. But, if a law is in excess of the rightful power or right of the legislature, or, to use a technical term, is *ultra vires*, it has no more force or validity in determining rights than the act of a private individual—a principle that should be very familiar to us in America, where it is the constant practice of the courts to apply it in every case where a statute is in conflict either with the written constitution or with the fundamental principles of political science.[2]

Laws are, therefore, analogous to contracts, grants, and other expressions of the will of private individuals, all of which are valid or otherwise, according to the rights of the party making them; or, in other words, laws, contracts, and grants are all species of one *genus*—namely, expressions of human will—all of which are governed by the same rule, that they are efficacious or otherwise, according to the precedent right of the authors. Thus, for example, a grant of land by the State, either by direct legislation or by a patent issued in pursuance of laws providing for the disposition of public lands, will, like a private grant, confer title, provided the State owns the land or has the right to dispose of it; but neither can the State or an individual transfer to any one the property of another, nor can either subject any one to an obligation to another, unless by virtue of some precedent right to do so.

Laws or statutes, therefore, like other expressions of human will, and like customs, enter into the determination of rights only as elements of the problem; and their effect must in all cases necessarily be determined by some principle of natural reason, even though it should be none other than the principle, so commonly asserted, but manifestly absurd, that the right of the State to dispose of the lives, the liberties, and the fortunes of its citizens is absolute and unlimited. Their existence as elements of the law is, therefore, no more inconsistent with the scientific character of jurisprudence than is that of contracts or other human acts. Nor, as we have already observed, does the theory adopted upon this point materially affect the doctrine of private rights, which is but little affected by legislation, and certainly not more so under a despotic government than under a democracy. And hence it has happened that the most perfect expression of the law of

[1] People *v.* Williams, cited *supra*.

[2] Loan Ass'n *v.* Topeka, 20 Wall, 663; Cooley, Const. Lim. 487–495, cited Bliss, Sov. 33.

private right yet given to the world was the work of the jurists of the most despotic of all civilized governments that have ever existed. It is also to be observed that, though the rights of citizens may be and are outraged in a thousand cases by the Government in the pretended exercise of its rights, these do not, any more than do the torts and wrongs of private men, affect the theory of rights.

Legislation may be distinguished into two kinds. The first consists of those laws by which the rights of the State, other than those relating to jurisdiction, are exercised and its corresponding duties performed. This species of legislation is usually designated public law (*jus publicum*), and includes what may be called political or administrative law, and also the law of crimes and punishments. The latter, as originally proposed, we leave out of view. The former—that is, political or administrative law—does not constitute a co-ordinate department, or, as a whole, even a part of what we call the law, which, according to its true conception, consists merely of the aggregate of the rules and principles, whether natural, arbitrary, or customary, by which a jurisdiction is created, its procedure regulated, and its decisions governed. But many of the laws of this class come incidentally before the courts, like contracts and other acts of private persons, and thus enter as an element into the law. Thus, it is assumed, and I think rightly, in all existing systems of law, that the State is the owner of all unappropriated land; and under our system the title of the land is, in all cases, derived from the Government. Hence, in controversies as to title between individuals, the validity of land patents is constantly brought into question; and the laws, in pursuance of which they are issued, though identical in their nature with the acts of private corporations or individuals, thus, like them, become elements in the determination of the right in controversy.

To this class belong laws concerning taxation, the army and navy, public education, the support of the poor, and generally all those laws which are commonly considered as making up the Political Code.

The other class of laws consists of those which relate to jurisdiction, and may, without impropriety, be called *jural* legislation. They include the laws, fundamental or otherwise, by which a jurisdiction is established, and those which regulate its procedure, and also all laws regulating matters jurally indifferent or indeterminate—as, for instance, laws providing for the succession of intestate estates, regulating marriage ceremonies, establishing the age of majority, etc.—according to received notions and existing practice, but erroneously, those so-called laws which constitute what we have called judicial legislation, which, as we have said, is essentially a part of jurisdiction. *Jural* differs essentially in its nature from ordinary legislation; for, with regard to the latter, the State is vested, within certain limits, with the power or right to adopt any means which it may deem most conducive to the efficient administration of the Government or the general welfare of the people; while, as to the former, it is, or ought to be, governed solely by the consideration of what is just and equal between men. In other words, the object of administrative legislation extends to the promotion of the welfare of the people generally; while that of jural legislation extends only to the promotion of its welfare in a particular way, viz., by causing justice to be observed.

The relation of the two kinds of legislation to the subject of private

rights is very obvious. With regard to laws of the first class, namely, those constituting the political law, they can affect rights only in the manner in which the acts of private individuals can affect them; that is to say, if any such act of the Government is in the exercise of its right, the rights of individuals will be affected by it, and otherwise not. With reference to the laws creating a jurisdiction and regulating its procedure, it is obvious that rights, so far as their realization and enjoyment are concerned, may be very materially affected, either by the failure of the law to give the necessary jurisdiction, or by giving to the courts, under the name of jurisdiction, the actual power, and even by imposing upon them the actual injunction to violate rights; and the same remarks are true, to even a greater extent, of judicial legislation; but it is certain that such legislation cannot detract from the rights of any one, or add to the rights of any one, as against the party injured. In the words of Cousin, "No law can impose on us a false duty, or deprive us of a true right." And the same remark will apply to such legislation as may be necessary to define indeterminate rights; with regard to which the power of the State goes no further than the necessity of the case may require. For no necessity can be perceived for vesting in the Government the power of interfering with the determination of right, except in the well-defined class of cases referred to in the preceding paragraphs; and, in fact, no such power is vested in it.

It may indeed happen, as we have said, and, indeed, under existing political arrangements, must often happen, that remedies or actions may be lacking for existing rights, or even that rights may be violated by the State, as by private individuals; but, in such cases, the right continues to exist, and its existence is recognized by the law. This has been fully explained on a former page, to which the reader is referred. But there cannot, as we have observed, be a more dangerous fallacy than to infer the non-existence of a right from its violation.

CHAPTER V.

NATURAL RIGHTS DEMONSTRATED FROM THE ABOVE PRINCIPLES.

§ 1. *Of the Right of Self-Ownership.*

OF rights *in rem*, the fundamental right is the right of personal liberty, or, as it may be more accurately termed, the right of self-ownership, or of property in one's self. The essence of all rights consists, indeed, in the liberty to act; and, therefore, in the widest sense of the term, the right of liberty includes all rights whatever. But this liberty to act has reference to different subjects—viz., to one's self, to other persons, or to things; and it is necessary, therefore, to distinguish the right which one has in himself from those rights which he has in or over other persons, whether *in rem* or *in personam*, and those which he has in things, or the right of property. To distinguish the former right, the term "personal liberty" is generally used; but the idea is more precisely expressed by the term

"self-ownership," or property in the person; and, to avoid the ambiguity of the former term, the latter will be generally used.

The right of self-ownership implies the absence of interference of any kind with the free exercise of the faculties within the limits of the right; and this includes not only immunity from bodily harm and from imprisonment or other physical restraint, but also from injury to the health or to the reputation, or from any other interference with the comfortable enjoyment of life, or with the pursuit of happiness, or with such other end as one may set before himself.

The right includes also the right to use, to some extent at least, the material things naturally existing around us, and that have not been appropriated by others. It is evident, however, that the use of anything by one must necessarily, to some extent, detract from the personal liberty of all others within whose power it would otherwise be to use it, for a use by one takes away from all such others the liberty of using the thing in any way inconsistent with the first use; and this is true, not only of such things as are susceptible of being reduced to ownership, but also of those things which cannot be permanently appropriated, such as air and water and the sea, and navigable lakes and rivers and other highways. Thus, for instance, a ship sailing on the sea must occupy a certain space, and requires also new space in which to move freely in the direction in which the master desires to go. The right of personal liberty in the owner of the ship, therefore, necessarily diminishes the personal liberty of others so far as to exclude them from the use of the portion of the sea occupied by the former; that is to say, not only the space actually occupied by the ship, but also the space required for its further movement in the direction in which it is going; for the word "occupy" does not necessarily imply actual physical or bodily occupation or holding, but may consist merely in the manifestation of a will, coupled with the power, to use. In other words, it is not by the hand or physical act only that a thing is occupied; but, where it is within the natural power of any one to use it, the manifestation of his will or intention to use it is a complete occupation, which cannot be interfered with by others without interfering with the personal liberty of the occupant. Where the movements of the ship, therefore, indicate an immediate intention upon the part of the master to move in a particular direction, or this intention is otherwise manifested, the space thus indicated is occupied or appropriated for the time being, and others are excluded from occupying it or from otherwise interfering with the movements of the ship; for to do so would be to prevent the free exercise of the will, or, in other words, to interfere with the personal liberty of the owner of the ship; and such interference could be justified only by some right in the party interfering, which by the hypothesis he does not have. And, with regard to things which are susceptible of permanent appropriation, it is obvious that the use of them by one must, in general, detract in a much greater degree from the liberty of others than in the case of the sea and other things of that class. For many things of the former class can only be used by consuming them, and the use of them, therefore, forever deprives others of the liberty to use them; and, even with regard to those things which may be used without consuming them, the use is generally of a more permanent nature, and, therefore, must deprive others of the liberty of using them for a longer period.

This kind of interference, however, is to a certain extent inevitable,

and therefore justifiable; for, without the use of a certain amount of air, water, land, fuel, food, and shelter, man cannot exist; and, without the use of a much larger amount of such things than is required for mere existence, he cannot exist healthfully and comfortably, and freely exercise and develop his faculties. Just in proportion, therefore, as he is deprived of such things as he desires to use, and which, but for human interference, he could use, he is deprived of his liberty; and, if he is altogether deprived of them, he is deprived of existence itself.

The question, therefore, is not as to the existence, but as to the limit, of the right; and upon this point it is important to remember that the presumption is in favor of the right, and that, to assign any limit to it, such limit must be affirmatively established.

With regard to this question, where the supply is unlimited—that is, where there is enough to satisfy the desires of all—it is manifest that there is no limit to the right; for, in such case, the use by one of what he needs leaves sufficient to satisfy others, and therefore leaves them an equal personal liberty.

But where the supply is limited, the use by one of more than his share infringes upon the equality of personal liberty. This, however, is an injury common to all who might otherwise use the things appropriated; and it is, in general, manifestly impossible to determine the extent of the injury to any one in particular, and therefore impracticable to determine the extent necessary for any one to interfere in order to protect his right. No individual, therefore, can have the right to interfere with the use of an unappropriated thing by another; but the right of all to equal personal liberty in this particular must, as in other cases of undefined jural relations, be left to the State to define and enforce. We, therefore, conclude that in general the State only has the right to regulate the use of unappropriated things where the supply is limited; and that, in the absence of restraint by the State, the right to use such things is in general unlimited.

§ 2. *Of the Right of Property.*

The right of property in things is derived from, and rests upon, the right of personal liberty, or self-ownership. In the language of Cousin, "the first property is the person, and all other property is derived from this."[1]

Where the supply of unappropriated things is unlimited, every man has the right, or jural liberty, to use them; and even where the supply is limited, in the absence of restraint by the State, he still has such a right. By the term "right to use" we mean not only the right to put to what in common language is called a useful purpose, but to put to any use whatever, useful or otherwise; or, in other words, to act freely with regard to the thing, as one's will may dictate. The right to use implies the right to take and to hold, or, in other words, to occupy, any unappropriated thing which one may desire to use; and while the occupation continues, the right to use is exclusive, and no one else has a right to interfere with the occupant in his use of the

[1] "The True, the Beautiful, and the Good," Lect. 14, p. 289. "In making it my own, I stamp it with the mark of my own person; whosoever attacks it attacks me; the blow dealt it strikes me, for I am present in it. Property is but the periphery of my person extended to things." (Ihering, "The Struggle for Right.")

thing; for, to do so, would be a direct infringement upon his personal liberty. Any person, therefore, has a right to appropriate, or make property of, any unappropriated thing; or, in other words, the mere occupation of an unappropriated thing creates in the occupant a right of property in it.

With regard to chattels, or things movable, this principle has in our law, at the present day, a full application, it being a received principle that mere occupation or appropriation of an unappropriated thing gives a complete title.

It is in this way, also, that, before the era of organized States, property in land originated; as, for instance, was the case in the early history of the Aryan and Semitic races, as recorded in Scripture, and by Herodotus and others; and as is the case still in unoccupied territories.[1]

But, in the territories of an organized State, it is obvious that property, or rather an absolute property, in land cannot thus be acquired; for, in such case, the land is no longer unoccupied, having in fact been appropriated by the State. Hence, in our law—and I presume in other systems—all titles to land are regarded as derived from the State, either by direct grant, or by the law as established by legislation, or by custom.

But even within the territories of a State—in the absence of legislation to the contrary—a right in lands may be acquired good against all but the State. For where one has occupied such land, no one but the State, or some one vested with its right, can have any right to interfere. Hence, it is a received principle of the law that, where an occupant of land is dispossessed by any one not having a better right, he can recover against the intruder upon mere proof of prior possession.

With regard to movables, or chattels, however, there would seem to be an even higher title to them than in mere occupation. For such property is in general produced by, and receives its whole value from, human labor, and would therefore seem to belong to the producer in a peculiar and a higher sense than property by mere appropriation. For, if our faculties are our own, the fruits of their exertion must be equally ours, except in the single case where one wrongfully exercises his labor upon the property of another—in which case he acquires no right.[2]

This conclusion, however, is based upon a misconception of the right which men have with reference to unappropriated things, and which they originally had to all things naturally existing. This right is not a mere abstraction, but consists in the liberty to use, and therefore to appropriate, unappropriated things. It cannot be asserted, therefore, that all men have a right in all things, or, indeed, that men have any right in unappropriated things at all, beyond that implied in

[1] On this point there seems to be a general concurrence of opinion; but different reasons have been assigned as the grounds upon which this efficacy can be attributed to occupation. The history and nature of the question are fairly well presented by Blackstone, 2 Com. 8, and by Mr. Christian in his note on the passage cited.

[2] Upon this last principle, Grotius bases an argument against the proposition that the right of property can be derived from labor. Assuming that originally all things belonged to all men in common, he infers that the common right of all to any particular thing cannot be taken away by the act of any individual, without the consent of all, any more than that the property of an individual could be thus affected. (1 Rutherford, Inst., Bk. 1, Ch. 3, § 10.)

the right of personal liberty, namely, the right to appropriate them. However this may be, the producer is, from the nature of the case, always the first occupant, or appropriator; and, on this ground alone, his title is good.

All property, therefore, rests for its foundation upon occupation, or simple appropriation, either by the individual or by the State.

§ 3. *Of Rights in rem Other than the Right of Property.*

The family relations give rise at once to rights *in rem* and rights *in personam*, which must be carefully distinguished. It is with the former only that we have to do at present.

These are of essentially the same nature as the right of property—the essential idea of the right in both cases being the relation existing between the owner and third persons, viz., that the former shall be free to act with reference to the subject of the right without interference from others. From this, in the case of property, it follows that the thing owned is subject absolutely to the will of the owner. But, in the case of family rights, this is not the case; for here a new element is introduced, viz., the right of personal liberty in the subject of the right, by which the power of the owner is necessarily limited.

In general, where such power exists over the subject of the right, it is a power corresponding to some specific obligation in him, and therefore belongs to the class of rights *in personam*, which are distinct from, and not to be confounded with, the class of rights we are now discussing. In addition to this, however, the right is sometimes accompanied by a power over the subject of the right, similar in kind, though not in degree, to that of an owner over the thing owned; as, for instance, the right of a parent in the child, and possibly that of the husband in the wife. But the presumption in this, as in all other cases, is always in favor of liberty against the power; and, perhaps, such power can be affirmed to exist only in cases where the protection of the subject of the right imperatively requires it.

Where such power exists, it is an accidental, and not an essential, element of the right; for it does not, in any way, affect the relation between the owner of the right and third persons, in which, as we have seen, the essence of the right consists. Thus the right of the child in the parent, or of the wife in the husband, is not less perfect than that of the parent in the child, or that of the husband in the wife, though unaccompanied by any power or control over the subject of the right; and, indeed, in all cases the right is most perfect, or at least most valuable, where the relations of the parties are governed by love, and freely rendered. The rights *in rem* growing out of the family relations consist, therefore, merely in the exclusive liberty of enjoying the society, affection, and services of the subject of the right; and whether these are freely rendered or denied, and whether in the latter case they can be compelled by force or not, affects merely the value, and not the nature, of the right. Hence, the question of power over the subject of the right belongs rather to the subject of *status*, and is immaterial to the present discussion, which is concerned only with establishing the relations of the subject of the right toward third persons.

The rights of husband and wife originate in contract, and in the right of each to dispose of himself or herself. But while such rights originate in, their extent and nature are not altogether determined by,

the agreement of the parties, but are modified by certain other principles established in the positive morality of the European race—such as the principle of monogamy and of permanency in the married relation, and that which forbids marriage within certain degrees of kindred. These principles are also, I think, susceptible of a theoretical demonstration—which, however, would require a greater space than is consistent with the scope of the present work.

The right of the parent in the child is directly derived from the right of self-ownership of the parents; for the child is the offspring of their bodies, which are theirs; and, therefore, *quoad* the rest of the world, he is theirs also, as much as the offspring of their cow or other animal.[1] It is true that their right in him is limited by his right in himself; but this, as we have seen, does not detract from the parent's right in the child, which consists exclusively in a relation between the parent and third persons. Indeed, the right of the child adds an additional sanctity to that of the parents; for his existence and education depend on their fostering care, which it is his right to receive, and with parents the most sacred and valued of their rights to afford.

With regard to the right of the child in his parent, it is no less apparently derived from his right of self-ownership; for, leaving out of view all question of duty or obligation from the parent to the child, Nature has so constituted men that, in general, they freely render to their children a protection and support which is essential to their welfare, and in part to their existence. To this extent, therefore, the parent is appropriated to, and becomes the property of, the child; and any interference with this appropriation by third persons is a manifest violation of his rightful liberty to enjoy the love and services of his parent.

§ 4. *Of Rights in Personam, or Obligations, and Herein First of Obligations EX DELICTO.*

By a delict, or tort, is meant a violation of a right *in rem*, and such violation must necessarily consist in some interference with the subject of the right.

In the case of the right of self-ownership, the owner and the subject of the right are one; and, therefore, any interference with the one is necessarily an interference with the other; but, in the case of other rights *in rem*, the right can only be violated by an interference with the subject of the right, for any other interference would amount to a violation of the right of self-ownership. Thus, in the case of the right of property, a man may be prevented from exercising the right either by direct restraint imposed upon himself, or by the thing owned being taken from him; but, in the former case, the wrong is a violation, not of the right of property, but of the right of personal liberty.

Such interference with the subject of the right may consist in a permanent removal of it from the possession or power of the owner, as where one imprisons another, or takes away his property, or his wife or child; or it may be a mere temporary interference. Where the subject of a right *in rem* is taken away from the owner's power or possession, it is an obvious consequence, from the definition of the right, that it should, if practicable, be restored.

It seems equally obvious that, if from the destruction of the subject

[1] Grotius, Bk. 2, Ch. 5, §1; Puffendorf, Bk. 6, Ch. 2, § 1.

of the right, or otherwise, it should become impracticable to restore it, restitution in value or compensation should be made; and also that, even should it be restored, the party injured should be compensated for the temporary deprivation of its use, and for any other loss or damage resulting from the injury.[1]

§ 5. *Of Obligations* EX CONTRACTU.

According to an opinion which seems universally to prevail, the mere agreement or promise of the obligor creates in him an obligation to perform it;[2] and this, if we use the term "obligation" in its loose sense, as synonymous with duty, may as a general proposition be taken as true. But it is not true that it is of itself a sufficient cause to create an obligation in the proper sense, or a right *in personam*. For, in many cases, it is obvious that it would be iniquitous and unjust for the obligee to exact, or to have the power of enforcing, the promise; and, therefore, in such case, *ex vi termini*, he has no such right. Thus, in the case of a gratuitous, promise, while there may be, and probably is, in every case, a duty upon the part of the promisor to perform his promise, there is in general no right in the promisee to exact it, or obligation in the promisor to perform it. And, accordingly, neither in our own nor in the civil law are such agreements enforced. It follows, therefore, that the agreement by itself does not constitute the cause of the obligation.

It is, however, obvious that, where the obligee gives or does something in consideration of the promise, an obligation arises in the obligor either to render the agreed equivalent, or otherwise to make restitution; and the obligee acquires a corresponding right to exact the performance of this obligation. For here the obligee is induced to suffer detriment by the act of the obligor; and though he suffers this detriment with his own consent—and, as a general rule, one who consents is not injured (*volenti non fit injuria*)—yet this consent is upon the condition that the promise shall be performed; and if it is not performed, the case is precisely the same as where the obligee is made to suffer detriment by force or by fraud. It will also generally happen that, in addition to the detriment thus suffered voluntarily by the obligee, further detriment will also be suffered by him, either in consequence of the agreed detriment, or in consequence of his reliance upon the promise of the obligor; and for this involuntary or collateral detriment, which is equally caused by the obligor, he is equally obliged to make restitution. The case is, therefore, thus far precisely identical with that of delict—the detriment caused to the obligee by the obligor being in either case a sufficient cause for the obligation to make restitution.

The detriment suffered by the obligee, which is contemplated or agreed to by the parties, is called in our law the consideration, and in the civil law the cause of the contract or obligation.[3] It would,

[1] The principle of compensation, though apparently self-evident, in reality requires a somewhat abstruse argument to establish it. This, however, for lack of space, I am compelled to omit.

[2] This opinion is embodied in the maxims of the Roman law, *pacta legem faciunt inter partes*, and *pacta quælibet servanda sunt*.

[3] "Nothing is more remarkable than the modification, in recent English and American cases, of the doctrine of consideration. For nearly a century it was held that a consideration must be either a benefit to the promisor or a detriment to the promisee.

however, be more correct to distinguish between the consideration or the cause of the contract, and the cause of the obligation; and to say that the former consists of the agreed detriment only, and the latter of all the detriment suffered, whether agreed or collateral.

The cause of the obligation being, therefore, the detriment caused to the obligee by the acts of the obligor, it follows that this constitutes also the limit to the extent of the obligation; and that the obligee has no right to exact more than to be restored to the position he would have been in but for the acts ot the obligor, namely, his promise and his failure to perform. This conclusion is apparently paradoxical, but the presumption is in favor of liberty, and the burden of proof, upon those who assert the existence of a more extensive right; and we know of no principle that can be adduced in favor of such a claim.[1]

It is, however, clear that, in the absence of fraud or imposition, the extent of the obligation is limited also by the agreement—or, in other words, that the performance of the agreement extinguishes the obligation without regard to the comparative value of the consideration; for where one disposes of his property or his services freely, and for an understood consideration, the loss sustained by the inadequacy of the consideration to compensate him for the detriment which he agrees to suffer is the consequence of his own free act, for which the obligor is in nowise responsible.

It follows, from the principles above stated, that where the consideration for a promise is inadequate, and there is no collateral detriment, the promisee has no right to exact the specific performance of the promise, or to exact anything more from the obligee for a breach

The conclusion, it is true, was not very lucidly expressed; the consideration, it was said, must 'flow' from the promisee; but, no matter how the rule was stated, it is now settled. There must be a detriment of some kind to the promisee; it may or may not be that the promisor is benefited by the bargain, but detriment to the promisee there must be. Now, it is an interesting fact that this is the conclusion to which Schlossmann comes after a copious and subtile discussion, not only of the Roman standards, but of the philosophy of modern jurisprudence. . . . Other illustrations of the way in which German authorities have recently been invoked to sustain the conclusions of English judges will hereafter be given in detail. It is enough now to say that, even if our sole object be to reproduce English jurisprudence, no book on contracts can meet the present need, unless it at least gives us what is said by great German commentators, now recognized in England as authoritative in the jurisprudence common to Germany and England." (Wharton, "On Contracts," preface, pp. 5, 6.)

[1] Except, indeed, that of general utility, which may always be urged in favor of any opinion of which one happens to be convinced, and to which all that is said by Bentham and Austin about conscience, or the moral sense, may with more propriety be applied; as, for instance: "One tells you that he has in himself something which has been given him to teach what is good and what is evil, and this he calls either his conscience or moral sense. When looking at his case, he decides such a thing to be good, such another to be bad. Why? Because my moral sense tells me so; because my conscience approves or disapproves it." (Bentham, "Theory of Leg.," 3, 1.) "As for the moral sense, . . . conscience, they are merely convenient cloaks for ignorance or sinister interest; they mean either that I hate the law to which I object, and cannot tell why, or that I hate the law, and that the cause of my hatred I find it incommodious to avow. If I say openly, I hate the law, *ergo*, it is not binding and ought to be disobeyed, no one will listen to me; but by calling my hate my conscience, or my moral sense, I urge the same argument in another and more plausible form—I seem to assign a reason for my dislike, when in truth I have only given it a sounding and specious name." (Austin, Jur. 221.) Substituting for "conscience" and "moral sense" the terms "perception of utility" and "sense of utility," the sentiment expressed will become as just as it is forcibly expressed.

than the restitution of the consideration, or its value. For inadequacy of consideration is, in fact, to the extent of the inadequacy, no consideration; and, upon the same principle that we affirm that a promise without a consideration is not jurally binding, we must also affirm that no obligation rests upon the promisor to perform a promise for which the consideration is inadequate, or to do more than to compensate the promisee for the detriment which he has suffered. Thus, if one agrees to pay another a hundred dollars, either in money or in labor or in goods, for a horse which is worth but five, there is obviously no consideration for the promise as to ninety-five out of the hundred dollars agreed to be paid; and the obligee, therefore, has no right to exact anything more than a return of the consideration, together with compensation for such collateral detriment as he may have suffered.

In applying this principle, however, there is always involved a question of fact with reference to the value of the consideration or agreed detriment; and this question is always one of great difficulty. For it is not the exchange value of the consideration, but its value or utility to the obligee, that is to be ascertained—a question often altogether indeterminate, and with reference to which, as a general rule, the obligee is himself obviously the most competent judge. Hence, as a practical rule, it is reasonable to assume, unless the contrary clearly appears, that the value of the consideration to the obligee is as agreed upon by him.

We, therefore, conclude that the detriment caused to the obligee by the acts of the obligor—viz., the promise and the breach—is at once the cause and the measure of the obligation of the obligor, and of the corresponding right of the obligee; but that, in determining this detriment, the agreement itself must, unless the contrary appears, be taken as its measure.

The rules of the law as to the measure of damages in cases of contract, though not altogether consistent with the principles of right here laid down, yet obviously rest upon them. For though it is held, as a general rule, that "the contract itself furnishes the measure of damages,"[1] yet the proposition is not to be taken as universally true, but is subject to numerous exceptions, which qualify the rule in such a way that the general result is substantially as stated in the preceding paragraph, with the exception that, owing to the erroneous notions which prevail as to the cause of the obligation, the presumption in favor of the fairness of the contract is, perhaps, too strongly insisted upon. A brief examination of the rule, in connection with the exceptions referred to, will make this apparent.

1. To assert that the agreement is absolutely the measure of compensation for the breach of a contract is, in effect, to assert that it is the cause, and of itself a sufficient cause, for the obligation. Hence it would follow that all agreements, whether with or without consideration, would create obligations in the obligors to perform them, and corresponding rights in the obligees to exact their performance. But it is admitted, as we have already observed, that, where there is no consideration, there is no obligation or right; and, accordingly, neither in our own nor in any other system of law are such agreements generally enforced.

2. It would also follow, if the agreement is to be taken absolutely

[1] Sedgwick, "Meas. of Dam." * 200.

as the measure of damages, that the obligee would in all cases have the right to exact, not only the value of the agreed equivalent for the detriment suffered by him, but the agreed equivalent itself; or, in other words, he would have a right, not merely to compensation for the failure of the obligor to perform his promise, but to the specific performance of the promise itself; for, if the agreement is to control, the obligee is entitled to what was agreed upon, and cannot justly be put off by the substitution of another thing to which he has not agreed. But neither in our own nor in any system of law is such a right recognized; but, with certain well-defined exceptions, compensation only is given.[1]

3. Even in the exceptional cases where specific performance is as a general rule allowed, it is refused if the consideration is inadequate.[2]

4. Upon the same principle, in the case of promises to pay money or goods, the obligee would in all cases be entitled to recover the full amount agreed to be paid; and this is, no doubt, the general rule. There are, however, numerous exceptions, to some of which we will refer. Thus it has always been a rule of equity, and is now equally the rule at law, that an agreement to pay a penalty for non-performance of a promise cannot be enforced; and the rule applies to all cases of alternative promises to pay money in case of non-performance, where it does not appear that the amount agreed to be paid is a *bona fide* estimate of the actual damage sustained.[3] In other cases, also, the courts refuse to enforce agreements which are manifestly unequal—as, for instance, in such cases as Thornborow *v.* Whitacre,[4] where one for valuable consideration agreed to deliver two grains of rye-corn on Monday next, and four grains on the next Monday, and doubling on each Monday for a year; or, as in James *v.* Morgan,[5] approved by Lord Chancellor Hardwicke in Earl of Chesterfield *v.* Jansen,[6] where one agreed to pay for a horse a barley-corn for the first nail in the shoes of the horse, two for the second, four for the third, and so on for twenty-four nails; or as in the case of usurious contracts and numerous other similar cases, in which the courts refuse to enforce the agreement in its entirety, and give compensation only.

From all of which it clearly appears that the rule of law which makes the agreement the measure of damages in cases of contracts rests merely upon the presumption—which is, indeed, perhaps carried too far, that the parties themselves are the most competent and the safest judges of value; and not, as is commonly assumed, upon the principle that the agreement itself is the cause, and consequently the measure, of the obligation.

§ 6. *Of Obligations* EX MERO JURE.

The remaining class of obligations to be considered are those arising from mere right (*ex mero jure*), among which may be instanced the following:

1. The parent is under obligation to support his minor child, and the child has a corresponding right to exact such support.

2. Where property comes into the hands of anyone without the consent of the owner—as, for instance, where lost property is found or

[1] Sedgwick, Meas. of Dam. 10
[2] N. Y. C. C., § 1894, and cases cited.
[3] Sedgwick, Meas. of Dam. 497, *et. seq.*
[4] 2 Ld Raym. 1164.
[5] 1 Lev. 111.
[6] 1 Wils. 286–295.

property is delivered by mistake—the person receiving the property is under obligation to restore it. In such case, if on demand he refuses to restore it, an obligation *ex delicto* arises, but, antecedently to such demand and refusal, an obligation *ex mero jure* exists.

3. Upon the same principle, where one receives money which justly belongs to, or should have been paid to, another—as, for instance, where money is paid by mistake to one which ought to have been paid to another—an obligation arises in favor of the latter, which, in the absence of an express agreement to pay, is an obligation *ex mero jure*.[1]

4. Where one, without the knowledge or consent of the owner, takes charge of his property, he is under obligation to use due diligence in its care and preservation, and to render a just account of profits received.

5. In the same case, where labor is performed or expense incurred, which is necessary to preserve the property—as, for instance, in the case of lost property on land,[2] or derelict or captured ships at sea,[3] an obligation arises in the owner to make compensation to those performing the labor or incurring the expense.

In the above, and in all cases of obligations of the class under consideration, the cause of the obligation is a detriment suffered by the obligee, or impending over him, for which the obligor is responsible; and they may all be brought under the one general formula, which is equally applicable to cases of delict and contract, viz., that every man is under obligation to make restitution for detriment suffered by another for which the latter is the responsible cause, and is equally under obligation to prevent the happening of such detriment. Two elements must, therefore, concur in this, as in the case of delict and that of contract, namely, detriment, actual or impending, to the obligee, and responsibility for such detriment in the obligor.

Thus, in the case of a parent and child, it is evident that the child must suffer a detriment by the failure of the parent to provide it with the necessary means of life; and that such detriment, if it happens, will be the effect of the parent's voluntary act in bringing him into the world, conjoined with his failure to supply him with the necessaries of life. The case is, therefore, the same in principle as where one man imprisons or wounds another, or otherwise puts him in a situation that he must suffer unless assisted. So, where one has the money or other property of another, it is obvious that the latter suffers a detriment so long as he is deprived of it, which is caused by the former; and it is equally clear that, where one takes charge of the property of another without his consent, he is responsible for any damage that may happen to the property, or for any loss of profits caused by his negligence or fault.

[1] "When a defendant receives money which belongs to plaintiff, or which in equity and justice he should not retain, and which ought to be paid to plaintiff, *assumpsit* or debt lies against him for the amount of it, as for so much money had and received to plaintiff's use." (2 Saunders, Pl. and Ev. *670.) "This kind of equitable action to recover back money which ought not, in justice, to be kept is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund . . . In one word, the gist of this kind of action is, that the defendant, under the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money." (Mansfield in Moses *v.* McFerlan, 2 Burr. 1012.)

[2] 2 Kent, Com. *356.

[3] 3 *Id.* *245.

The case of the obligation of the owner of property to compensate another—as, for instance, the finder of lost property, or the salvors of a derelict or captured ship—for labor performed or expenses incurred in the preservation of property, though apparently clear, is somewhat more difficult to explain.[1] Here the detriment suffered by the obligee is sufficiently obvious, but the responsibility of the obligor is not so clear, for there is neither fault nor consent upon his part. The obligation, indeed, obviously rests upon the implied or presumed consent of the owner; for if the obligee had interfered, not only without his consent, but against his will, no liability would have arisen. But implied consent is not consent at all; nor is actual consent possible in such a case. Some other principle must, therefore, be sought in order to explain the cause of the obligation; and such a principle may perhaps be found in the maxim of the Roman jurists, that it is just that no one should profit by the detriment of another, justifiably or innocently incurred.[2]

[1] Obligations of this class are designated, in the Roman law, by the term *de bonorum gestione.* (Inst., Bk. 3, Ch. 28, § 1; Austin, Jur. 944.)

[2] *Nam hoc natura æquum est, neminem cum alterius detrimento fieri locupletiorem* (Dig. 12, 6, 14); or if not, at least in the principle of necessity, or the *argumentum ab inconvenienti.*

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ERRATA.

Preface, p. ii. Foot note erroneously printed in body of page.
Page 6. " " " " " "
Page 62. In title of Chapter VII, for "Utilarianism" read "Utilitarianism."

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BY

GEORGE H. SMITH

AUTHOR OF

"Right and Law," "The Law of Private Right," and Essays in the American Law Review on "The Certainty of Law and the Uncertainty of Judicial Decisions," "The True Method of Legal Education," and other subjects.

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PREFACE.

A limited edition of this little work has been printed, with a view of submitting it to friends of the author, and others, who, he may have reason to suppose, are interested in political science. But in submitting it even to this limited class of readers, the author is painfully conscious, from experience, that both the subject of the work, and the method in which it is treated stand in need of apology.

In regard to the subject,—which is Jurisprudence,—its study in England and this country, within the last fifty years, has fallen into almost entire neglect; and there is now no subject more generally unpopular. The general reader regards it as belonging peculiarly to the province of the lawyer, and the lawyer, in general, as a study of no practical utility, and, with which, consequently, he has no concern. And the few who are addicted to philosophy, turning to the works of the modern English jurists, find there something which bears no resemblance to real Jurisprudence, but which has usurped its place, and even its name.

This so-called jurisprudence is the theory of Austin, (the principal subject of our review,) which has become so generally received and firmly established in English philosophy as to occupy exclusively the whole field of Jurisprudence. But this theory, as will be shown more fully in the body of the work, asserts, as its fundamental principle, that the law (*Jus*) is merely an expression of the arbitrary will of the government, or state; and, consequently, that rights, and Justice or Right, are the mere creatures of that will. Hence, if the theory be true, it follows that Jurisprudence,—which, as universally conceived by all but the modern English jurists, is

the Science of Justice or Right,—can have no existence. There is nothing, therefore, to surprise us in the fact that the study of the subject has fallen into decay. For true Jurisprudence, so far as opinion can effect such a result, has been abolished in England and English-speaking countries; and the *pseudo* Jurisprudence that has been substituted for it, as may be verified by reference to the current works upon the subject, is, of all others, the dreariest and the most uninviting.

But real Jurisprudence, the science of Rights, or of Right or Justice, is, in fact, the science of the necessary conditions of rational social life, and therefore the fundamental part of Political and Social Philosophy. And, as of all the departments of the Science of Human Nature it is of most transcendent and vital importance, so it excels them all in the scientific rigor of its method,—which approaches nearly to that of Geometry,—and, consequently, in the certainty of its results. Hence, if we leave out of view its fortunes in England during the present century, no other branch of philosophy has had a grander history; nor is there another that excels, or even equals it, either in the genius of those who have devoted themselves to its study, or in the interest and beneficence of the results achieved. For among its devotés, (or, as Celsus calls them in the passage cited below, its priests,)

"*Jus est ars boni et æqui*, of which some one deservedly calls us the priests; for we conduct the cult or religion of Justice, and profess the knowledge of the Good and the Equal, separating the equitable from the inequitable, and distinguishing the lawful from the unlawful * * * following, if I am not deceived, a true, and not a spurious philosophy." Pandects II., 1, § 1.

are numbered all the great philosophers of the world, from Socrates, Plato and Aristotle, to Kant and his followers, inclusive; and among its achievements, the development of the Roman Law, the reconstruction of political society in Europe, when emerging from the anarchy of the dark ages, and the institution of International Law or Right. In short, its history is the history of human civilization;

for civilization itself, in the proper sense of the term, is merely the capacity of a people for social life, or, in other words, its capacity for realizing justice; and Jurisprudence may, therefore, without impropriety, be said to be the Science of Civilization.

From this science and its literature, consisting of the best work of the greatest intellects of the race, and to which in the continental countries of Europe fresh additions are being constantly made, English-speaking peoples, since the advent of Bentham and Austin, and by the predominance of their philosophy, have been effectually isolated; and it may, therefore, with confidence be asserted that no task can be nobler, or, to the philosophic mind, more interesting, than the one I have here, however inadequately, attempted; namely, to refute the fantastic and pernicious theory by which the English mind has been so long dominated, and by which, for the time being, it has been reduced, in its capacity to deal with jural and political science, to a state approaching imbecility, and to rehabilitate in our midst true Jurisprudence.

It remains to add a few words in explanation of the method in which the subject of the work is treated; which, with the average reader, it is to be feared, will prove equally unpopular as the subject itself. The modern English theory of Jurisprudence is universally admitted to be the creation of Austin; by whom the loose and popular notions of Bentham were reduced to a rigidly coherent system. But Austin himself, for his fundamental principles, drew largely upon Hobbes, whose philosophy is thus necessarily brought within the scope of our inquiries. The history of modern English Jurisprudence, therefore, consists, almost exclusively, of the works of Hobbes and Austin; and hence our investigations will, in the main, be confined to a review of their reasoning. Now, it happens that the works of Hobbes and Austin present the most striking and instructive examples anywhere presented,—and, in modern times, almost the only

examples,—of the application of the analytical or logical method to political science; and, hence, an adequate review of their works will be scarcely less interesting as a study in logic, than on account of their political theories. And this aspect of the subject, for several reasons, will be found peculiarly deserving of our attentions. For the use of this method, which consists in the accurate formulation of our premises, and in reasoning rigorously from proposition to proposition, as in geometry, presents, over all others, at once a great advantage and a great danger.

For, on the one hand, it is its peculiar merit, if we regard it as a means of discovering truth rather than as an instrument of persuasion, that the logical development of an argument discloses its weak points, and thus, if the same method be used in reviewing it, facilitates the detection of error. And, hence, the mistakes of great reasoners, like Hobbes and Austin, are always more apparent, or at least are much more easily pointed out, than those of loose and inconsequent thinkers. On the other hand, a logical argument, if understood, forces assent, unless some error or inaccuracy can be detected in thepremises; and even an argument only apparently logical will be equally persuasive until the fallacy lurking in it be discerned. But where an argument is skillfully constructed, this task, whether it be the detection of a fallacy in the reasoning, or of a weakness in the premises, requires the closest and most critical examination of every link in the chain of reasoning. Hence, while the logical method facilitates the detection of error, it is, to readers careless of their logic,—as is, in fact, remarkably illustrated by the influence of Hobbes' philosophy, and the domination of Austin's theory over the English mind,—a most powerful instrument of deception. The use of this method in our present investigations is, therefore, imperatively demanded, on the twofold ground that it is, at once, the readiest, and the only adequate means by which error can be detected and refuted in the reasoning of such masters of the craft as Hobbes and Austin.

But, independently of this consideration, there is another reason that imperatively demands our adoption of this method; for it is, in fact, the true method of political science, and the only one from which assured results can be anticipated; as is, in fact, demonstrated affirmatively by the example, not only of Hobbes and Austin, but also of Aristotle, Bacon, Locke, Hume, Grotius, and other great reasoners, and negatively, by the lack of convincing power in the great mass of the political, social, and moral disquisitions of the day. Hence, if we would justly weigh the reasoning of Hobbes and Austin, or even understand it, we must adopt their own method; and, in doing this, in addition to the knowledge we may otherwise gain, and which cannot in any other way be obtained, we will learn from their example the true and the only method for the successful investigation of the problems of jurisprudence and of political science generally; of which method it is one of the principal objects of this work to demonstrate the efficacy and power.

But the logical or analytical method demands the use of a style altogether different from that in common use,—which may be called the popular or rhetorical. For it is the peculiar characteristic of the logical style that it must be accurate or aphoristic, *i. e.*, it must express the exact truth, without any admixture of error; for otherwise our conclusions will be altogether unreliable. And this requires the exact analysis of the meaning of the terms we use, and the formal statement of our propositions; which to the general reader is distasteful. For, while the logical style admits, and even requires, great brevity of expression,—so that in general the matter of volumes of ordinary popular disquisition may by means of it be compressed into a few chapters,—yet, it demands on the other hand, a degree of attention and independent thought, that only a few highly trained, or exceptionally gifted minds are willing to give, or, perhaps, are capable of giving.

The best type of this style is found in the mathematics,

and especially in geometry, and also in the writings of the classical jurists of the Roman law; and, at least in our *investigations*, it can never be departed from without the risk of error. Of the essential characteristics of this style the writings of Hobbes and Austin are among the best examples; the former, on the whole, superior; but the latter, in their analytical parts, though lacking the graces of rhetoric, excelling all others in a rigid observance of the requirements of logic.

My own style I have sought equally to adapt to the subject, and to the nature of our investigations, and I trust I may say of it, without vanity, with Hobbes, that while "there is nothing I distrust more than my elocution, nevertheless, I am confident, excepting the mischances of the press, it is not obscure."

Los Angeles, June 11, 1893.

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CHAPTER I.

INTRODUCTORY.

§ 1. The fundamental problem of political science is to determine the nature and extent of human rights; but this problem relates to three several subjects, which, though intimately connected, require separate consideration. These are the rights or powers of the State, the rights of individuals, and the law; which last is the means by which rights, public and private, are realized.

Strangely enough, this branch of political science,— supremely important as it is, — is, in our language, at the present time, without a distinctive name, generally recognized as belonging to it. The reason of which is, that the term, jurisprudence, the name really appropriate to it, and by which alone it can be adequately expressed, has been wrested from its true meaning by Austin and his followers, for the purpose of denoting certain varying and ill-defined notions of their own; and the conception originally denoted by it is thus left without a term to express it. We must, therefore, begin by restoring the term to its proper meaning.

The subject has been examined with care by Mr. Holland, and, though his conclusions appear to me to be erroneous, his views upon it present the question involved with great clearness, and may, therefore, be referred to with advantage. Jurisprudence, he says, is merely the knowledge of *jus:* but it happens that the latter term denotes, "not merely the sum total of laws, but also the sum total of rights, (*jura, rechte, droits,*) and the sum total of all that is just, (*justum, recht, droit*)"; and hence jurisprudence, accordingly as we use the term, *jus*, may denote "the science of any one of three things, viz: (1) of law, (2) of rights, (3) of justice." These several senses of the term he regards as essentially different, and hence is of the opinion that one of them must be adopted to the exclusion of the others.

Accordingly, he adopts the first of the definitions referred to, and regards it as a piece of good fortune that when we thus define jurisprudence, viz, as "the science

of law," we are spared the ambiguities which beset the expression of that proposition in Latin, German, and French, and which, in his opinion, have greatly obscured its exposition in those languages.[1] In this Mr. Holland agrees with Austin, and others of the modern English school of jurists, all of whom regard the ambiguity of the term, *jus*, *droit*, *recht*, etc., used in other languages to denote the law, as a fruitful source of confusion and inaccuracy of thought; and there is, perhaps, no other point on which the English jurists so pride themselves as on their supposed superiority in this respect to their continental brethren.

[1] Jur. 12, 13.

Nor is there any other with reference to which the vanity of their pretentions is more apparent; for while there is, no doubt, a certain difference in the several senses of the term jurisprudence, referred to by Mr. Holland, yet it is equally certain,—as will be more fully shown in the sequel,—that, in whichever sense it be used, the term expresses, under certain modifications, the same essential idea.

Thus if,—as we are admittedly at liberty to do, provided we consistently adhere to the definition,—we define jurisprudence as the science of rights, it follows that it is also the science of justice; for justice is but the observance of rights, or the rendering to every man his right.

But, according to a conception almost universal, and which will be explained more fully hereafter, the law itself is but the practical means of realizing rights; and, if this conception be true, the term jurisprudence may also be used, without impropriety, as in fact the lawyers habitually use it, to denote the science or methodized knowledge of the law of private right. For this branch of the law is made up of the doctrine of rights, as recognized in the law, (or, in other words, of *actionable*, or juridical rights,) and of the doctrine of actions; which are but the forms or *formulæ* used for the enforcement of rights, (or, as defined by Heineccius, *medium jus persequendi*); and, hence, if jurisprudence be regarded as the science of rights, or of justice, the subject of private right, or *justice* as actually administered by the courts, must be regarded as belonging to it.

It appears, then, that of the three meanings of the term jurisprudence, distinguished by Mr. Holland, the first and

second are identical; and that the third is entirely consistent with these, provided it be assumed, (as it is one of the principal purposes of this work to establish,) that the rights with which the law deals, are in fact, as they are in name, *rights*, in the proper sense of the term.

On this assumption, therefore, jurisprudence may be defined to be the science or doctrine of rights, or of justice or right; and may be regarded as theoretical or practical, accordingly as we have in view the abstract theory of rights, or the doctrine of rights as actually realized in the community by means of the law, or in other words, juridical rights.

With regard to the former, perhaps the best illustration of its scope and methods in recent English literature is presented by the political works of Mr. Herbert Spencer, and especially the "Social Statics" and "Justice"; both of which—the former preferably, and the latter with equal propriety—might have been entitled, "Jurisprudence." Of the latter, or practical jurisprudence, the best models are presented by the works of the classical jurists of the Roman Law, and those of the modern civilians, and especially Savigny; and also by the works of Grotius, and other writers on the Law of Nations and of Nature.[1]

This view of the nature of jurisprudence, though repudiated by the modern English jurists, and consequently, since the time of Austin, somewhat obsolete with us, is by no means a novel one; it is, in fact, the orthodox view of the subject, in which jurists generally, from the time of Aristotle, have, with the exception of Austin and his

[1]In this connection the following observations of Leibnitz on the Roman lawyers will be found interesting:

"I have often said,—observes that great jurist and philosopher,—that, after the writings of the geometricians, there exists nothing which in point of strength, subtlety and depth, can be compared to the works of the Roman lawyers; and, as it would be scarcely possible from intrinsic evideuce to distinguish a demonstration of Euclid's from one of Archimedes or Apollonius, (the style of each of them appearing no less uniform than if reason herself were speaking through her organs,) so also the Roman lawyers all resemble each other like twin brothers; inasmuch, from the style alone of any particular opinion or argument, hardly any conjecture ceuld be formed about its suthor; nor are the traces of a refined and deeply meditated system of natural jurisprudence anywhere to be found more visible or in greater abundance. And even in those cases where its principles are departed from, in compliance with the language consecrated by technical forms, or in consequence of new statutes or of ancient traditions, the conclusions which the assumed hypothesis renders it necessary to incorporate with the external dictates of right reason are deduced with a soundness of logic and with an ingenuity that excites admiration. Nor are these deviations from the law of nature so frequent as is commonly supposed." Cited by Dugald Stewart, Philosophy of the Human Mind, 2, 3, 3.

followers, substantially concurred. This, for the present, will sufficiently appear by reference to the definitions in the Institutions and Pandects of Justinian, given in the note, from which the definitions in the text are taken. Of the introductory parts of these works, the modern English jurists, from Austin down, are wont to speak with contemptuous severity; but, in fact, they may be taken as the best expression extant,—in brief space,—of the true nature and general principles of the law; and as such they have been generally accepted by continental jurists, and, until lately, by the jurists of our own law.[1]

§ 2. Thus defined, jurisprudence, as has been intimated, may be regarded as treating of, (1) the Theory of the State, (2) the Theory of Private Rights, and (3) the Theory of the Law.

The several problems thus presented by jurisprudence have given rise to many conflicting theories; and these—bearing as they do upon the most vital questions of practical politics, and imperatively demanding, in the opinions of their advocates, a realization in practice—have naturally aroused the strongest passions and prejudices of mankind. But, fortunately, or unfortunately, there is one country in which for a while all conflict seems to have ceased, namely, England; where of late years one theory has become so predominant—at least among theorists—as practically to exclude all others, and to be regarded, like the Copernican theory of the universe, or the doctrine of evolution, as no longer within the pale of legitimate discussion.

This theory, briefly stated, is that the power, or right of the State over its subjects is, from its essential nature, necessarily unlimited or absolute; that the law is but an expression, and rights and obligations but the creatures, of the sovereign will; and, consequently, that in that will alone is to be found the standard of the just and of the unjust. From this it follows, and the theory, in fact, asserts, that the notions of natural right or justice and of natural

[1] "*Justitia*, (i. e. the virtue,) *est constans et perpetua voluntas jus suum cuique tribuendi.*" Hence abstract, or, as it is called by Aristotle, *political* justice, consists in rendering to every man his right (*jus suum cuique tribuere*).

*Jurisprudentia est * * * justi atque injusti scientia;* and hence, it is said: *Præcepta juris sunt honeste vivere, alterum non laedere, suum cuique tribuere.*

Jurisprudence, or rather *jus*, (the law) is also defined by Celsus, as "the art of the good and equal" (*ars boni et æqui*); and he asserts—and, as I will endeavor to show, truly—that it is "a true, and not a pretended philosophy."

rights are mere delusions ; of which to speak seriously (to use an illustration of Sir Henry Maine) is as though one were to assert the Ptolemaic theory of the heavens, or to pretend to listen to the music of the spheres.

Of this doctrine, as originally conceived by Bentham, and as subsequently developed into a complete and coherent system by Austin, and of the modifications it has received at the hands of later writers, I propose to give a brief history, and, at the same time, to subject it to a critical examination. But there are several other theories, one directly opposed to this, and the others intimately connected with it, which, in order that the questions involved may be distinctly presented, must also be considered.

§ 3. Of these, the first to be mentioned is involved in the popular conception of rights ; which, as usually happens in such matters, has been adopted by the lawyers, and thus become an integral part of the common law.

According to this doctrine,—of which the modern English theory is on every point the direct negation,—rights, or at least certain rights, exist naturally, and are, therefore, not the creatures but the cause of the existence of government; which, in fact, owes its origin to the necessity of securing their observance, and in advanced societies can exist only upon the condition of substantially securing them. Hence the necessity of establishing justice, or securing the observance of rights, as it is the cause (or *raison d'être*) and the condition of government, is also the measure of its power. That this is the doctrine of our law will not perhaps be generally conceded, but that it is so will sufficiently appear in the progress of our investigations.

§ 4. In the construction of their theory Bentham and Austin availed themselves largely of the reasoning of Hobbes ; and hence the theory of the former is commonly regarded as in substance a development of that of the latter; but, in fact, the two theories differ radically on the most essential points.

The points in which they agree are in the psychological theory that men are not susceptible of any other than self-regarding motives, and in the doctrine of absolute sovereignty ; but, with regard to the nature of rights, and of the law, they differ entirely,—Hobbes, on these points, as will be seen, agreeing substantially with the Common

Law doctrine, and Bentham and Austin inventing a theory altogether new. It will be necessary, therefore, on this account, as well as on account of its intrinsic interest, to examine at length the philosophy of Hobbes.

§ 5. The theory of the State asserted by Hobbes and Austin, and now generally prevailing in England, though in the peculiar form it there assumes not elsewhere accepted, is, in its fundamental character, identical with the modern doctrine of sovereignty as commonly held on the continent. The difference between the two is that the English theory rests upon an attempted demonstration, and has been logically developed to its ultimate consequences, and thus become a coherent system. But this is not the case with the more general doctrine of sovereignty, which, as commonly held, is scarcely more than a vague opinion, assumed without any attempt to demonstrate it, and without a clear perception of the consequences logically deducible from it.

But it is in this form that political theories are most formidable; for when a theory is logically developed its weak points are made apparent, and often the very attempt to demonstrate it will, by way of *reductio ad absurdum*, show its falsity. But a mere opinion until thus tested may, and generally does, vary in meaning, according to the varying temper of the mind and the exigencies of argument, and thus becomes an instrument by which the most opposite conclusions may be proved,—as, for example, is notably illustrated by the different uses made of the doctrine of a social contract by Hobbes, Locke and Rousseau, respectively. It will be necessary, therefore, before entering upon the consideration of the English theory of the State, to make a few observations upon the doctrine of sovereignty, with the view of justifying the assertion that as commonly held it is a mere unverified opinion, which cannot be sustained otherwise than on the reasoning of Hobbes, Austin and other English writers; and which, therefore, if sustained, must take the form in which it is asserted by the English jurists, and be regarded merely as an undeveloped form of their theory.

The term, sovereign, means simply, superior.[1] In a political sense, it denotes merely the monarch, or other supreme officer, or organization in the state; and its correlative, *sovereignty*, the power vested in the sover-

[1]Low Latin, *Superanus*, formed with suffix, *anus* from Latin *super*, "above." Skeat.

eign, whether consisting of one or many. Both terms are strictly comparative, and there is nothing in their original meaning to imply that the sovereign or supreme power in the state is absolute or unlimited.

Originally the terms were applied to the form of sovereignty at one time almost universally prevailing in Europe, which was that of a monarch or single sovereign; but with the development of improved forms of political organization, their application has been extended to other forms of government, and the term sovereignty has thus come to denote the supreme political power of a state wherever vested. But obviously, in its original application to a single sovereign, it denoted a single thing, or unit, namely, the power of a single man, which was necessarily indivisible; and this notion it has carried with it in its new application to a multiplex sovereign. Hence, sovereignty, whether vested in a single monarch, or in several different officers, or classes of officers, or in different departments, or, even, as in federal governments, in different states, is habitually conceived to be a single indivisible power; and thus a problem of great difficulty presents itself, to the great bewilderment of political theorists, namely, the problem of determining where, in each particular case, the sovereignty is vested,—a task similar to that of locating an ignis-fatuus or will o'-the-wisp, and which in fact, as we shall see, admits of as many varying solutions as the fancy may dictate. But however the problem is solved, or wherever the sovereignty be regarded as located, it is generally agreed that it is in its nature unlimited and absolute, as well as indivisible. "In all forms of government," says Blackstone,—in a passage often quoted, and which voices an opinion almost universal,—"there is, and must be, * * * a supreme, irresistible, absolute, uncontrollable authority, in which the *jura summi imperii*, or the right of sovereignty, exists."[1]

The genesis of this theory is readily accounted for by the historical events out of which it grew. In the struggle between the kingly power and that of the feudal lords, in the Middle Ages, the former naturally came to be regarded as the last refuge of personal security, and the only hope of organized social life; and out of this arose an almost universal sentiment in its favor, which found its expression in the modern doctrine of sovereignty; and this doctrine, either in its original form, as

[1] 1 Com. 48-9.

applied to a single monarch, or, in a secondary sense, as applied to other forms of government, has come to be so generally received in the political philosophy of Europe, that the term itself, in popular use, carries with it the connotation of being an absolute, despotic power, or right. And this notion, intensified by the events of the great English Civil War, and of the French Revolution, continues to prevail in Europe, and especially in England, and also to a considerable extent in this country.

Thus, the term *sovereignty* has come to be, what is called, a question-begging term. For, as commonly used, it assumes the theory connoted by it ; and argument in support of it becomes superfluous, and against it impossible. For, when an opinion rests upon the false sense of a term, it will not be affected by the refutation of any reasoning that may be urged in its support, but will survive, though every conceivable argument in its favor be shown to be untenable,—in this respect, the opposite seeming to take place from what occurs, under analogous circumstances, in the vegetable kingdom ; where, if the roots of a plant be destroyed, it will die ; but an opinion rooted in a general prejudice, though the reasoning upon which it rests be refuted, will seem for a while to seek, and apparently to find new roots, and a renewed life.

It may however be safely assumed, that, if there are any arguments in favor of the doctrine of absolute sovereignty, they have not escaped the unrivalled acuteness and penetration of Hobbes and Austin ; and that it must therefore stand or fall with the reasoning adduced by them in support of it.

CHAPTER II.

STATEMENT OF HOBBES' THEORY.

§ 1. All men are more or less blinded by prejudice and passion; and impartiality or indifference to the result of our reasoning is the rarest of all logical qualifications. On this account allowance must always be made, as in astronomy, for the "personal equation;" which is much more readily done in the case of the astronomer, whose mind is generally indifferent to the result, and the personal error therefore regular, than in the science of human nature, where nearly every problem excites the prejudices and passions of the mind and heart; and where, in general, the theory is first formed, and the reasoning to support it afterward sought, and the wish is often the father to the thought.

In the case of Hobbes, this correction is readily made. He lived during the struggle between the King and Parliament in England, and was profoundly impressed, both by experience and observation, with the misery occasioned by civil war. And this impression was probably exaggerated by congenital disposition; for it is related of him that he was brought prematurely into the world through his mother's fright at rumors of the coming of the Spanish Armada. From this, and the associations of his life, he was naturally led to espouse the royal cause, and it cannot be doubted that his theory was thus largely influenced. His works were composed at an advanced age, long after his political views had been formed, and, from the circumstances under which they were written, as well as from internal evidence, are obviously to be regarded rather as a political polemic in support of a preconceived conclusion, than as an impartial investigation of the political problem. Hence, while all the resources of his powerful and methodical genius are brought to the support of his thesis, there is much in his works that it would be difficult to believe represented his convictions, were we not familiar in our own times with the force of political prejudice.

But the task of making proper allowance for these

misleading influences is, in the case of men of Hobbes' logical turn of mind, immensely simplified by their general accuracy of thought and expression, which facilitates the detection of error. And it also usually happens, and notably so in the case of Hobbes, that writers of this character, in the more abstract parts of their work, where prejudice has less place to operate, themselves furnish us with the means of correcting their errors. Hence, the value of a philosophical work is not to be estimated by its success or failure in establishing completely the main thesis to which it is devoted, for in this respect nearly all have failed; but by the partial, and often undervalued results obtained, and chiefly by the more or less logical character of the method of reasoning observed. The main excellence of thought is clearness and precision; to be intelligently and clearly right is the greatest achievement, but it is no mean achievement to be logical, even in error; and, in fact, such errors have been the means by which philosophy has advanced. Thus it happens that incomparably the most valuable contributions to political philosophy in modern times are the works of Hobbes and Austin. For, though their conclusions are often false and paradoxical, they have at least taught, by actual example, the true method applicable to the science of jurisprudence, and the only method that can be looked to for anyfurther progress in it.[1]

§ 2. The theory of Hobbes may be stated in the following propositions, which are classified accordingly as they relate to the theory of the state, of rights, or of the law.[2]

Of the State.

The fundamental assumptions of Hobbes' philosophy are the denial of moral distinctions, as naturally existing, and of the possibility of any motive of human conduct

[1] "When Leibnitz, in the beginning of the eighteenth century, reviewed the moral writers of modern times," says Mackintosh in his dissertation on the Progress of Ethical Philosophy, "his penetrating eye saw only two who were capable of reducing morals and jurisprudence to a science. So great an enterprise might have been executed by the deep, searching genius of Hobbes, if he had not set out from evil principles; or by the judgment and learning of the incomparable Grotius, if his powers had not been scattered over many subjects, and his mind distracted by the cares of an agitated life."

[2] Our citations are to the Leviathan, in the edition of Mr. Morley, published by George Routledge & Sons, London, Glasgow, and New York, 1887.

other than a regard to self-interest.[1] From the conflict thus necessarily arising between the desires of men, *i. e.*, upon the assumed hypothesis of an absence of all moral restraint, they become enemies; and, in the absence of government, there results a state of never-ending war of every man against every man, in which condition "the notions of right and wrong, just and unjust, have no place. * * * Force and fraud are, in war, the cardinal virtues."[2]

But, from this condition, means of escape are presented, consisting partly in the passions, such as fear of death, desire of commodious living, etc., and partly in the reason, which suggests certain articles of agreement called "the laws of nature," but which are improperly so called, being, in fact, merely dictates of reason.[3] "The first and fundamental law of nature" is that men ought to endeavor to secure peace; and from this "is derived the second law, that a man be willing, when others are so too, * * * to lay down his right to all things, and be contented with so much liberty against other men as he would allow other men against himself."[4] And from this law a third follows, that men perform their covenants; for otherwise the condition of war will still continue.[5] In this (the third) law, "consisteth the fountain and original of justice"; which is defined to be the "keeping of covenants"; and injustice, to be "the not performance of covenant." But Hobbes here falls into an inconsistency,— adding that "whatsoever is not unjust is just." Hence,— as we shall see is asserted *infra*,— where there is no covenant there can be no breach, and therefore everything is just; which is inconsistent with the definition that justice is the "keeping of covenant."[6]

But, in the absence of government, covenants are invalid, because there is no security for their performance, "and therefore he who performeth first does but betray himself to his enemy; contrary to the right, he can never abandon, of defending his life and means of living."[7]

Hence "before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their covenant;" in the absence of

[1]Leviathan, 32, 33.
[2]Id. 65.
[3]Id. 66.
[4]Id. 66.
[5]Id. 71.
[6]Id. 72, 73.
[7]Id. 69, 72.

which "all men have a right to all things," and "nothing is unjust,"[1] but "every man will and may lawfully rely on his own strength and art for caution against all other men."[2]

The only way to erect such a coercive power, and thus to escape from the natural condition of war, is for men "to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, into one will * * * This is more than consent or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man; * * * This done, the multitude, so united in one person, is called a commonwealth; in Latin, *civitas*. This is the generation of that great "Leviathan," or, rather, to speak more reverently, of that "mortal God," to which we owe, under the immortal God, our peace and defence."[3]

The sovereign is created not by covenant between himself and the people, but by covenant of the people only, "one to another," and consequently there can be no breach of covenant on the part of the sovereign.[4] A covenant between the sovereign and the people may indeed exist, but it is inoperative, "for want of a superior power to enforce it."[5]

All men are equally bound by this covenant of society: he who consents, by his covenant; and he who does not, because, unless his consent be assumed, he is "left in the condition of war he was before, wherein he (may), without injustice, be destroyed."[6]

The sovereign power is, necessarily, indivisible. "For powers divided mutually destroy each other."[7] And the disposal of the succession is also necessarily in the existing sovereign. For, if not, then on his death "is the commonwealth dissolved, and the right is in him that can get it."[8]

Of the Nature of Rights.

"Right consisteth in the liberty to do or forbear;" "for nothing is signified by the word 'right' than that liberty which every man has to use his natural faculties according to right reason."[9]

[1]Id. 72.
[2]Id. 82.
[3]Id. 84.
[4]Id. 85.
[5]Id. 85, 86.
[6]Id. 86.
[7]Id. 93.
[8]Id. 93.
[9]Id. 66.

"The right of nature," or "*jus naturale*," consists "in the liberty each man hath to use his own power as he will himself for the preservation of his own nature * * * and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto." Hence, "every man hath a right to everything, even to another's body."[1]

In a state of political society, this natural right is limited by the law or expressed will of the sovereign, and "the liberty of the subject lieth, therefore, only in those things which, in regulating their actions, the sovereign hath pretermitted, such as the liberty to buy and sell, and otherwise contract, etc.";[2] but, "in all kinds of actions by the law pretermitted, men have the liberty," (or right) "of doing what their own reason shall suggest for the most profitable to themselves."[3] Hence, "Right," (*i. e.*, rights in the aggregate) "is that liberty which the law leaveth us."[4]

Of the Nature of the Law.

There is some inconsistency, or at least apparent inconsistency, in the views of Hobbes as to the nature of the law, arising from the ambiguity of that term; which is sometimes used to denote a statute, or aggregate of statutes (*lex*), and sometimes to denote *the law*, (or *jus*). The two views will, therefore, require a separate statement.

The first is thus expressed:

"The civil law is, to every subject, those rules which the commonwealth has commanded him, by words, writing, or other sufficient signs of the will, to make use of for the distinction of right and wrong; that is to say, of what is contrary, and what is not contrary to the rule."[5]

Here the term law is obviously used in the sense of *lex*, which Hobbes expressly opposes to the term *jus*. "For," as he says, "right is liberty, namely, that liberty which the civil law leaves us; but civil law is an obligation, and takes from us the liberty which he law of nature gives us. Nature gave a right to every man to secure himself by his own strength, and to invade a suspected neighbor by way of prevention; but the civil law takes

[1] Id. 65, 66.
[2] Id. 101.
[3] Id.
[4] De Corpore Politico, B. 2, Ch. 10, Sec. 5.
[5] Lev. 123.

away that liberty in all cases where the protection of the law may be safely stayed; for insomuch *lex* and *jus* are as different as obligation and liberty."[1] Or, as expressed in another work: "The names *jus* and *lex*, that is right and law, are often confounded; yet scarcely are there two words of more contrary effect; for right is that liberty which the law leaveth us, and law is that restraint by which we mutually agree to abridge one another's liberty."[2]

According to this view, it would follow that the courts would have to be regarded as dealing principally with matters outside of the law; for the principal function of courts of civil jurisdiction is to enforce rights; and the principles by which the courts are governed in doing so constitute a part, and indeed the principal part, of what the Romans called *jus*, and what we, — but, in Hobbes' view, improperly, — call the law; which includes not only *jus*, or right, in the strict sense, but also *lex*. But, according to another and more deliberate view of Hobbes, the law of nature, which is but another name for natural right, or justice, is part of the civil law of every state; and it is the function of the judge to administer it as he would any other part of the law. Thus regarded, therefore, the law is no longer opposed to, but includes *jus* or right. Here, it is obvious, the term civil law is used in the sense of the Latin *jus*, or in the sense of *droit*, *recht*, *derecho*, &c., in other languages; or, in other words, it would seem that Hobbes himself falls into the usage which he has elsewhere reprobated. And this he in fact does, though, as we shall see, he attempts to reconcile the inconsistency of the two propositions.

On this point, more on account of the intrinsic interest, and value of his views on the nature of the law, than on account of the argument, which will be found to be manifestly untenable, I quote, somewhat at more length than usual, his own language:

"The law of nature and the civil law contain each other, and are of equal extent. For the laws of nature, which consist of equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature, as I have said before, * * * are not properly laws, but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then

[1] Id. 134.
[2] *De Corpore Politico*, B. 2, Ch. 10, Sec. 5.

are they actually laws, and not before, *as being then the commands of the commonwealth, and, therefore, also civil laws.* For, it is the sovereign power that obliges men to obey; for, in the differences of private men, to declare what is equity, what is justice, and what is moral virtue, and to make them binding, there is need of the ordinances of sovereign power and punishment, to be ordained for such as shall break them; *which ordinances are, therefore, a part of the civil law.*"

"The law of nature, therefore, is a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature. For justice,—that is to say performance of covenant, and giving to every man his own,—is a dictate of nature. But every subject in a commonwealth hath covenanted to obey the civil law." "Civil and natural laws are, therefore, not different kinds, but different parts of law; whereof one part, being written, is called civil; the other, unwritten, natural.[1]

"A law that obliges all the subjects * * * that is not written, or otherwise published in such places as they may take notice of, * * * is a law of nature. * * * The laws of nature need not any publishing or proclamation." But, "the law of nature excepted; it belongeth to the essence of all other laws, to be made known to every man that shall be obliged to obey them * * * For the will of another cannot be understood, but by his own word or act, or by conjecture taken from his scope and purpose, which, in the person of the commonwealth, *is to be supposed* always consonant to equity and reason."[2]

"The interpretation of the law of nature is the sentence of the judge constituted by the sovereign authority to hear and determine such controversies as depend thereon, and consisteth in the application of the law to the present case. For, in the act of judicature the judge doth no more but consider whether the demand of the party be consonant to natural reason and equity; and the sentence he giveth is, therefore, the interpretation of the law of nature; which interpretation is authentic, because he giveth it by authority of the sovereign, whereby it becomes the sovereign's sentence, which is law for that time for the parties pleading."[3]

[1]Id. 124.
[2]Id. 126.
[3]Id. 128.

"But, because there is no judge, subordinate nor sovereign, but may err in a judgment of equity, if, afterwards, in another like case, he finds it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law, nor obliges him to persist in it. Neither, for the same reason, becomes it a law to other judges, though sworn to follow it. For, though a wrong sentence given by authority of the sovereign, if he know and allow it, in such laws as are mutable, be a constitution of a new law in cases in which every little circumstance is the same, yet in laws immutable, such as are the laws of nature, they are not laws to the same, or other judges, in like cases forever after. Princes succeed one another; and one judge passeth, another cometh; nay, heaven and earth shall pass; but not one tittle of the law of nature shall pass, for it is the eternal law of God. Therefore, all the sentences of precedent judges that have ever been cannot, all together, make a law contrary to natural equity; nor any example of former judges can warrant an unreasonable sentence, or discharge the present judge of studying what is equity, in the case he is to judge, from the principles of his own natural reason."[1]

[1]Id. 128, 129.

CHAPTER III.

REVIEW OF HOBBES' THEORY.

§ 3. The several points of Hobbes' argument, on the theory of the State, are summed up in the following propositions:

(1) "That the condition of mere nature, that is to say of absolute liberty, such as is theirs that neither are sovereigns nor subjects, is anarchy and the condition of war."

(2) "That the precepts by which men are guided to avoid that condition are the laws of nature."

(3) "That a commonwealth without sovereign power is but a word without substance, and cannot stand;" and,

(4) "That subjects owe to sovereigns simple obedience."[1]

To these propositions, taken in their ordinary and proper sense, but little objection can be made; but they are not the conclusions which Hobbes set out to prove, and which he would have us believe. They present, therefore, as will be seen, a clear case of irrelevant conclusion, or *ignoratio elenchi*.

Thus, the first proposition, slightly qualified, may be taken as substantially correct, but it cannot be accepted as a necessary consequence from principles of human nature; nor can the argument upon which it is rested by Hobbes, namely, that man is incapable of any other motive than a regard to his own interest, be admitted. For a regard to the just claims, and even the welfare of others, or, in other words, justice and benevolence, or love, though less strong, are as clearly principles of human nature as selfishness. All that can be admitted on this point is, that with men in general the last is the predominating motive, and, with a great many, overrides all

[1] Lev. 162. To the last clause, *i. e.*, that "subjects owe to sovereigns simple obedience," is added, in the original, the qualification, "in all things wherein their obedience is not repugnant to the laws of God"; but I have omitted this, as being one of the cases to which I have referred, where Hobbes says what he obviously does not mean. For the passage is immediately followed by an argument to show that there are no cases in which the law of God justifies disobedience to the sovereign. (Id. 166, 167.)

others. Hence, taking men as we know them, the want of government must result in a state of conflict, which may very fairly be described as a state of actual, or ever impending war; and historically this conclusion, though in degrees varying with the grade of civilization, is fully verified. The proposition may therefore be assumed, not as necessarily true, but as an empirical generalization from past experience; and in this form it is a sufficient support for what Hobbes calls his first and second laws of nature; namely, that men should seek peace, and to that end subject themselves to government; propositions indeed that few dispute.

The third proposition, properly construed, is also obviously true, and is indeed involved in the preceding. For sovereign power, in its proper sense, is but the power of the government, whether it be greater or less; and the latter, therefore, cannot exist without the former. But this is far from being all of Hobbes' meaning. For, in his view, sovereign power is unlimited or absolute, and is also indivisible; and these are, therefore, the conclusions intended.

With regard to the first of these, it is sufficiently manifest that the power of government must be great; and we may even say with our author, *Non est super terram potestas quæ comparetur ei;* but that it is, or should be, either unlimited or irresponsible, or that it should be any greater, within the limits of our power to restrict it, than necessary for the efficient performance of its functions, does not follow from the premises; nor is there anything in the argument tending to establish such a conclusion.

With regard to the proposition that the sovereign power is indivisible, this necessarily follows, if it be admitted that it is unlimited. For, as is well argued by Hobbes, every division of the sovereignty necessarily impairs or diminishes it, or, in other words, limits it. For, leaving out of view the convenient fiction which regards the sovereign as one person, or, in other words, as a corporation or body politic, it is obvious that in complex or constitutional governments the power of every officer or department of the government is limited by that of others; and hence the notion of the divisibility of the sovereign power is inconsistent with the proposition that it is absolute. But this should be taken as a *reductio ad absurdum*, rather than as proof of the doctrine of absolute sovereignty. For, in fact, history abounds with examples of the actual

division of the sovereign power; as, for instance, in the past, the English and the Roman constitutions; and, in the present, our own constitutions, state and federal.

With regard to the fourth and last proposition, namely, that subjects owe to sovereigns simple obedience, this, if it be construed according to Hobbes' own definitions, may be readily admitted. For, according to the argument urged in support of it, *duty* is but the fear of evil consequences to be inflicted by the sovereign for disobedience, and it must therefore be admitted that, precisely to the extent there is ground for such fear, the duty, *ex vi termini*, must exist. Nor is anything added to the proposition by the supposition of a covenant upon the part of the subject; for covenants themselves are binding only so far as evil consequences to the individual are to be apprehended from their violation; and "justice, that is to say, not keeping of covenants, is" itself but "a rule of reason by which we are forbidden to do anything destructive to our life."

But here Hobbes is inconsistent; for obviously he intends us to understand the proposition as asserting the existence of such duty upon the subject, in the sense in which men commonly use the term. But thus construed the proposition cannot, under his theory, be admitted; for one of his fundamental postulates is that there is no such thing as duty in this sense. Hence, here, the principal object of Hobbes fails,—which was to inculcate, as it were, a religious reverence for "that Mortal God," Leviathan, "to which we owe * * * our peace and defense." For his conclusion, construed according to his own theory, and rendered into plain language, is merely that men will generally find it to their interest to obey the Sovereign. Hence, according to his theory, the condition of man is not essentially altered by the institution of government. No man is under any obligation to obey the government any further than his own interest, as understood by him, may demand; but every man still "has a right to everything; even to one another's body," so far as the right can be exercised with impunity. He may rightly defraud and rob his neighbor, and secretly disobey Leviathan himself, provided he may think it conducive to his interest to do so; for his right "of doing everything, which in his own judgment and reason he shall conceive to be the aptest means thereto," is modified merely by the fear of hurt from Leviathan. Hence, on Hobbes' theory,

the natural state of war would still continue, modified merely by fear of the sovereign; from which would result merely a change of the weapons commonly used, namely, from open force to cunning, and secret fraud.

It is, therefore, obvious that Hobbes' argument is inconclusive, and with this we might dismiss it; but there is a certain element of error underlying the whole subject, consisting in the ambiguity of the term *power* or *sovereign power*, which, as we shall see, has misled Austin and later English writers, and from which Hobbes himself has not altogether escaped; and which must therefore be explained.

The term *power*, in its strict and proper sense, denotes *might*, or *actual power*. It is also commonly used to denote *rightful power* or *right*, or, in other words, the power which, according to right, one ought to have; as when we say that the owner of property has the power to dispose of it, or that the child is subject to the power of the parent. In this sense Puffendorf uses the term when he says, "power is that by which a man is enabled to do a thing lawfully";[1] and Rutherford, when he says, "Civil power is in its nature a limited power";[2] or when he says, "Right and moral power are expressions of like import";[3] and Leibnitz, when he says that right is moral power, and obligation, moral necessity."[4]

Hence, the proposition that the power of the sovereign is unlimited, may mean either that it has unlimited actual power, which is, in effect, to say that its power is unsusceptible of actual limitation, (for otherwise the proposition would not be universally true,) or that it has an unlimited right to dispose of the lives and fortunes of its subjects.

Hobbes, in the original statement of the problem to be investigated, does not fall into the error of confounding these two meanings of the term. For the problem as stated by him is to determine "what are the 'rights' and 'just' power, or authority of a sovereign."[5] And this obviously is the only sense in which the question is worthy of consideration. For, whether the actual power of gov-

[1]Bk. 1, Ch. 1, Sec. 19.
[2]2 Inst. of Nat. Law, 393.
[3]Inst. of Nat. Law, B. 1, C. 1, Sec. 3.
[4]"*Est autem jus quædam potentia moralis, et obligatio, necessitas moralis. Moralem autem intelligo, quæ apud virum bonum æquipollet naturali; nam ut præclare jurisconsultus Romanus ait, quæ contra bonos mores sunt ea nec facere nec posse credendum est.*" Opera 4, 3, 294.
[5]Lev., Introduction.

ernment is limited or unlimited is purely a historical question, which can be answered only in one way, namely, by saying that, in fact, it always has been, in various degrees, limited. Hobbes' proposition is, therefore, to be understood as asserting the unlimited and irresponsible right or just power of the sovereign over its subjects; and it becomes essential, therefore, in order to understand its significance, to bear in mind what he means by the terms *right* and *just*. For these, as we have seen, are used by him in a sense different from that in which they are commonly understood, and the proposition in fact means something quite other than what it appears to express.

As used by Hobbes, the term *right* signifies merely the absence of restraint imposed by law. The proposition, therefore, merely asserts that the liberty or power of a sovereign is not limited by law, regarded as the expressed will of the sovereign, (or *lex*); which is but to assert the truism equally applicable to the sovereign and to others, that a man's liberty or power is not limited by his own will.

The same result also follows if we consider the term *just*, as used in the phrase, "just authority." "The definition of justice," he says, "is no other than the not performance of contract, and whatsoever is not unjust is just." The authority of the sovereign is not unjust, because it is not limited by covenant; and, therefore, it is just. The whole proposition, therefore, simply means that the sovereign power is not limited, either by positive enactment, or by contract; for, as we have seen, according to Hobbes' theory, the covenant by which the sovereign is created is exclusively between subjects, and the sovereign is not a party to it; and, if the sovereign make a covenant with a subject, it is void, for want of a superior power to enforce it.

But in the last proposition Hobbes forgets the reasoning upon which the proposition, that covenants between parties in a state of nature are void, was established by him; for the argument is merely that no man in a state of nature is bound by his covenant because he has no guaranty of performance by the other party. But this can have no application to the sovereign who has, in his own power, full guaranty of the performance of contracts made with his subjects.

When, therefore, Hobbes speaks of the right of the sovereign, he means something quite different from what

is usually meant by the term; and, having due regard to the propriety of language, it is clear that the so-called right of the sovereign is not, in fact, a right, but a mere unbridled power.

From what has been said, the fundamental defect of Hobbes' theory is clearly apparent. It rests upon the negative assumption—the old thesis of the sophists—that, independently of human institution, there are no such things as moral distinctions, no right and wrong, no just and unjust, no rights or obligations; and this will be found to be the common fundamental assumption of Bentham and Austin, and the later writers of their school, and to be, in fact, the foundation upon which the modern English theory of the state rests. Whether this assumption be true or false, it is, in fact, the fundamental problem of political philosophy, and will hereafter be fully considered.

§ 2. One of the most valuable features of Hobbes' theory is what may be called his jural method, which consists in the view taken of the fundamental problem or problems which it is the aim of jurisprudence to solve; or, in other words, of the scope of the science.[1]

In Hobbes' view, as we have seen, a right consists in liberty to act, and rights in the aggregate, or *right*, in the general liberty which a man has to act freely.

But the term *right* contains in its signification another element, namely, the quality of rightness; and hence, the liberty which constitutes the right is not to be understood as actual liberty, but as just or rightful, or, as it may be more appropriately termed, *jural liberty*.

In this connection the term *power* is so far synonymous with liberty that it may be used indifferently in the definition. For these two terms differ merely as the words "may" and "can," and therefore combine in their signification the same essential ideas, namely, absence of restraint and ability to act; and while each denotes one of these notions, it also connotes the other. A right, therefore, may be defined as consisting in the jural liberty or power to act, (*facultas agendi*) in a particular case or class of cases. Rights, therefore, are but particular parts or divisions of the general liberty to which a man is rightfully entitled, and in the aggregate constitute such

[1] I have elsewhere attempted to explain the nature and scope of jurisprudence (Right and Law, Ch. v., Callaghan & Co., Chicago); and as the view there taken is substantially that of Hobbes, I here make use of it, in an abbreviated form, in explaining his theory.

liberty; and the ultimate problem of jurisprudence, regarded as the science of rights, is to determine the extent of the rightful or jural liberty of the individual.

But, obviously, such liberty exists in every case in which one may not rightfully be restrained by other individuals or by the state; and as, in general, this liberty exists, and as there is always a presumption in its favor, the immediate problem is to determine the exceptional cases in which it may be rightfully restrained.

But the rightful power or liberty to restrain the free action of another where it exists, like the power or liberty to do any other act, is, *ex vi termini*, a right; hence, it follows that the liberty of the individual is limited, and limited only, by the rights of other individuals, or of the state.

It is precisely thus that the problem was conceived by Hobbes; and accordingly, as we have seen, the question to which his attention was chiefly directed was to determine "what are the *rights* and *just power* or authority of a sovereign"; but, as he did not conceive of the existence of moral distinctions independently of human institution, he lacked one essential element for the successful solution of the problem.

Hence, his paradoxical conclusion that in the state of nature every man has a right to everything, even to his neighbor's person; which, if propriety of language be regarded, is obviously absurd. For the term, *right*, as universally conceived, implies an exclusive liberty; and it is, therefore, as impossible for two rights to conflict, as for two bodies to occupy the same space at the same time.

Hence, also, he is forced to conclude that in a state of nature property could not exist; though clearly a man is born at least with a property in his own person; and the natural right of self-ownership is indisputable. And from this, as has been shown, with admirable acuteness and penetration by Herbert Spencer, all other rights can be logically derived. Naturally, therefore, he altogether failed to establish his theory, and in order to make an apparent solution was compelled to invent a fictitious social compact, and a fictitious mortal God.

Nevertheless, his conception of the fundamental problem involved, and of the mode of dealing with it, is profound, original, and true; and his failure resulted simply from the omission of an essential element in the problem;

which, as will be shown, if taken into account, renders it susceptible of an easy solution.[1]

§ 3. Hobbes' theory of the law is based upon his conception of the nature of rights, and his resulting conception of the method of jurisprudence, as explained in the last section. According to this view, a man's liberty or right prior to the institution of government is unlimited, but after the institution of government is limited by law. This limitation, however, does not in any way alter the essential nature of the right. It still consists in the natural liberty which every man has, within the limits imposed by the rights of other individuals, or the state, to govern his own life and actions according to his own reason. His liberty is less extended, but within its extent it is the same liberty that in a state of nature would constitute his natural right. Hence, the rights of a man in a state of political society, being merely the remainder of his natural right still left to him by the law, are of natural origin; or, in other words, are natural rights. Nor can the sovereign himself create a right of any other kind, for whatever right he may confer upon a subject has its virtue and force from the right conferred upon the sovereign by the law of nature, and is, therefore, as much a natural right as the right of a man to property, sold or given him by another.

But rights constitute a principal topic of the law, and hence, the principles by which rights are determined constitute part of the law of the land, and as such are administered by the judges. Hence, as asserted by Hobbes, "the law of nature"—which is but another name for natural right—"is part of the civil law in all commonwealths of the world." Thus it will be perceived Hobbes' conclusions are directly the opposite of the two principal tenets of the modern English jurists, namely, that in fact there are no natural rights, and that the law of nature, or natural right, is not part of the law.

The proposition that the law of nature, or natural right, is part of the law of the land, is logically deduced by Hobbes from his premises, and presents his deliberate and controlling opinion upon the subject. But, as we have observed, it is in conflict with the definition of the law,

[1]The method of Hobbes is in fact identical with that of Herbert Spencer, and also with that of Kant; by whom, indeed Mr. Spencer admits that he was anticipated, as Kant himself was by Hobbes; though the conception was undoubtedly original with Mr. Spencer, who was unacquainted with the views of his predecessors.

as consisting of the commands of the sovereign; and the arguments used by him to reconcile the two positions are calculated to obscure his real view. These arguments are, substantially, that on the institution of government the law of nature becomes part of the civil law, as being then the command of the sovereign, who is always to be supposed to intend what is consonant with equity and reason. But, as we have seen, he elsewhere asserts, and with great force, that it is not in the power of the sovereign to abrogate the laws of nature; though, of course, he may violate them.[1] Obviously, therefore, the argument is based upon what is called a legal fiction; which may be described as an assumption recognized to be in fact untrue, made for the purpose of apparently reconciling conflicting positions.

There is also another argument of the same kind, by which our author undertakes to explain the fact that custom is part of the law, and which is as follows:

"When long use obtaineth the authority of a law, it is not the length of time that maketh the authority, but the will of the Sovereign signified by his silence; for silence is sometimes an argument of consent, and it is no longer a law than the Sovereign shall consent therein.[2]

But here Hobbes trips in his logic, and is guilty of the fallacy of an *undistributed middle*. His conclusion, obviously, should be that *sometimes* custom derives its validity from the will of the Sovereign, signified by his silence; which is obviously the case where the Sovereign, knowing of the custom, and deliberately considering it, permits it to continue, and not otherwise; for the maxim, "*qui tacet consentire videtur*," can have no application to the silence of a person who knows nothing of the matter. But, obviously, this argument also was invented merely for the purpose of logically reconciling an obvious fact with his definition of the law, as being a command of the Sovereign. Otherwise, it was unnecessary; for custom is clearly part of the law on obvious principles of natural reason.

But these peculiar views of Hobbes' do not constitute an essential part of his theory of the law; which, indeed, will be better expressed if they be stricken out,—to use an expression of the lawyers,—as *surplusage*. Thus amended, his views may be accepted as a true and accurate description of the law, and as one of the most valu-

[1] Ante, page 20. [2] Lev., 124.

able contributions that have been made to jural science; and also as one which, in fact, constitutes a great step towards the successful performance of the task to which, in the opinion of Leibnitz, he alone, or Grotius, was equal, —namely, the task of "reducing morals and jurisprudence to a science." But unfortunately, as we proceed, we shall have occasion to verify, in his case, the sad expression of Mark Anthony:

> "The evil that men do lives after them,
> The good is oft interred with their bones."

CHAPTER IV.

OF THE THEORY OF BENTHAM AND AUSTIN.[1]

§ 1. Bentham and Austin agree substantially with Hobbes in assuming, as a first principle, the proposition that men are not susceptible of any other than merely self-regarding motives, and also in the conclusion that the power of the sovereign is necessarily absolute. Hence, their theory on this branch of the subject may be regarded as substantially a reproduction of his, and it will be sufficient for our purpose merely to explain the points of difference.

The first principle of Bentham differs in form of expression from that of Hobbes, and, perhaps, regarded merely as a psychological theory, may be distinguished from it, but in its bearing on the theory of the state, its effect is the same. Briefly, it is as follows :[2]

"The will cannot be influenced except by motives ; but, when we speak of motives we speak of pleasures and pains. * * * * * Nature has placed men under the governance of two sovereign masters, pain and pleasure. * * * The principle of utility subjects everything to these two motives."

Utility is defined as "the property or tendency of a thing to prevent some evil or to procure some good. Evil is pain, or the cause of pain. Good is pleasure, or the cause of pleasure." * * *

"He who adopts the principle of utility esteems virtue to be good only on account of the pleasures which result from it ; he regards vice as being an evil only on account of the pains it produces." "Virtue is a sacrifice of a less interest to a greater, of a momentary to a durable, of a doubtful to a certain interest. Every idea of virtue that is not derived from this notion is as obscure in conception as it is precarious in motive. * * * *Sic præsentibus*

[1]The subject of this chapter has been treated in the work already cited, "Right and Law"; but, as the matter is essential to the argument here, repetition to some extent is unavoidable.

[2]The citations, for the sake of brevity, are confined to Benthan's "Theory of Legislation," London, Trübner & Co., 1871, etc.,and, unless otherwise noted, will be found in the first chapter.

utare voluptatibus ut futuris non noceas. So use present pleasures as not to lessen those which are to come."[1]

Obviously, so far as the argument is concerned, the psychological principles of Bentham are identical with those of Hobbes, and the observations made as to the sufficiency of Hobbes' argument are equally applicable here; that is to say, it is clear, should the principle be assumed, that the necessity of government would be even more apparent than, in view of the actual constitution of human nature, it in fact is; but it would also follow that there would be no duty or obligation upon any one, any further than he might be impelled by the fear of punishment, to observe the will of the government; or upon the part of the government to regard the interest or welfare of his subjects; or, upon any man towards his neighbor, either to benefit him, or to refrain from injuring him; and finally, that Hobbes' state of never-ending war would still exist, with the difference only that, to the warfare of every one against his neighbor, would be added the warfare of Leviathan against him, and of him against Leviathan; and that fraud would thus, in general, be substituted for force. This indeed is, unfortunately, a substantially fair, though somewhat strongly expressed, description of the actual condition of modern civilization; but nothing surely could have a stronger tendency to aggravate it than the general acceptance of a theory that in effect asserts, not only the morality, but the necessity of such a condition.

From such premises it is obviously impossible to derive the notion of duty, either to the state or to our neighbors; and hence, as we have observed, Hobbes was compelled to invent the fiction of a social compact, and thus, by deliberate self-delusion, to reach the conclusion at which he

[1]In the above and numerous other passages, Bentham leaves no room for mistake as to his meaning; and it is one of the curiosities of literature that Mr. Mill should charge Dr. Whewell (whose works always seem to have excited in him a most unphilosophical animosity) with misrepresentation, for attributing to Bentham the proposition that "the test of morality is the greatest happiness of the agent himself." The "standard," Mr. Mill says, "is not the agent's own greatest happiness, but the greatest amount of happiness altogether." "Nor did he (Bentham) ever dream of defining morality to be the self interest of the agent." (Dissertations and Discussions, New York, Henry Holt & Co., 1882, Vol. III, pp. 315, 162.) But this, if language is capable of expressing any idea unequivocally, is precisely what is asserted by Bentham; and accordingly Mr. Sedgwick (Encyc. Brit., Article, "Ethics"), after remarking that "a supreme and unquestioning self-devotion, in which all personal calculations are suppressed," is a distinguishing feature of Mill's own theory, justly observes that such "a phenomenon * * * in Bentham's view is not even possible."

aimed. But Bentham, while justly reprobating this artifice, adopts a method hardly less reprehensible, and, by taking advantage of the ambiguity of the term utility, introduces a new principle, essentially different from the one first assumed; namely, the principle of *general* utility, which is that the welfare or interest of men in general, and not that of the agent, is the test or standard of right. But this principle, though perhaps not true, at least asserts the reality of duty, and of the distinction between right and wrong,—of which the theory of private or individual utility is the direct negation; and hence the two theories are essentially distinct, and,—except upon one hypothesis, to be referred to hereafter,—irreconcilable.

Having thus changed his premises, Bentham proceeds easily enough to the remaining propositions of his theory, viz: that "the public good ought to be the object of the legislator"; which, as an abstract proposition, is true enough, but is open to the objection that, according to the theory, no motive can be conceived why the legislator should govern himself accordingly; for, even if the principle of general utility be assumed, the theory of Bentham admits of no possible motive to secure its observance, except so far as self-interest may be effectual for that purpose.[1]

Austin's theory agrees with Bentham's, except that he postulates the existence of a God, in whose will is to be found the ultimate standard of right; from whose known benevolence, it is to be inferred that the principle of general utility, or the welfare of mankind, is enjoined; and from whose power, and the consequent fear of punishment, it is also to be inferred that it is the interest, and therefore, *ex vi termini*, the duty of all men to observe his will. In this way the inconsistency between the theories of *individual* and of *general* utility is reconciled. But it is held by Austin that the will of God is not sufficiently known to us, either by revelation, or by the principle of general utility,—"which, he says, as an index to the divine will, is obviously insufficient,"—to serve as a practical standard; and that the will of the government must therefore be adopted for that purpose. Hence he concludes, with Hobbes, that the source of rights and obli-

[1]There seems to be no doubt that Bentham, in confounding general and individual utility, was himself deceived by the ambiguity of the term, and that he continued, during a long life, to be unconscious of his error. But what is stranger is that his followers generally, including Mr. Mill, as we have seen, seem to participate in the delusion.

gations, and the paramount standard of justice, are to be found in the Sovereign Will.[1]

§ 2. The theory of Bentham and Austin does not rest upon the principle of utility, but upon another principle, namely, *the definition of the law as being the command or expressed will of the sovereign or supreme power in the state.*

The theory, in other words, regards all law as merely *lex*, and may, therefore, with propriety, be called the *legal* theory of jurisprudence, and thus distinguished from the *jural* theory, or theory that regards the law in the sense of *jus*.

The definition, however, is apparently inconsistent with the fact that the greater part of the law is not of statutory origin, but consists largely of custom, and has been developed by the courts in the administration of justice. To meet this point, Austin is compelled to assert *that judicial decisions are, in effect, laws, or expressions of the will of the sovereign, through the judges as its officers; and that in the development of the law, the judges in fact perform the functions of legislators;* and *that custom does not in fact constitute a part of the law until it has been recognized by the courts.* Thus custom, until it enters into judicial decisions, is not law, and judicial decisions in their essential nature, do not differ from statutes; and hence all parts of the law come under the definition, and the whole law, is composed of statutes merely.

But, as we have observed, the principal subject with which the law has to deal is "*rights*"; and the principles by which these are determined, or, in other words, the principles observed by the courts in determining them, constitute a part of the law, and indeed nearly the whole of the law of private right (*jus privatum*). *Hence, if the law is wholly an expression of the will of the state, these principles come under the definition of laws; and rights, which are determined by them, are in fact determined by the will of the state, and are mere creatures of that will.*

But, under the term *right*, is included every claim that men can have to personal liberty or security, and to the acquisition and use of property, to the enjoyment of the family relations, and even to life itself; and *hence, if rights are mere creatures of the sovereign will, the power or right of the sovereign over the property, the liberty, and even the lives of its subjects must be absolute or unlimited.*

[1] Jur., pp. 91, 94, 109, 112, 221.

An apparently similar, but, as will be seen, in reality, an essentially different proposition, is also asserted by Austin, viz:

"It follows from the essential difference of a positive law, and from the nature of sovereignty and independent political society, *that the power of a monarch, properly so-called, or the power of a sovereign number in its collective and sovereign capacity, is incapable of legal limitation.* A monarch or sovereign number bound by a legal duty were subject to a higher or superior sovereign; that is * * * were sovereign, and not sovereign. *Supreme power limited by positive law is a flat contradiction in terms.*"

And from this he draws another and quite a different inference, viz: *That "every free government is legally despotic";* which he says is "the same proposition dressed in different phrase." But this is not the case. For to say that the government is "legally despotic," is to say that despotic power is conferred upon it by law; which is obviously false, and, according to Austin's theory, impossible.

It follows, as a corollary from the above propositions, that the notion of natural rights *is a mere delusion, and that such rights can have no existence.* For, if natural rights do exist they must avail, *ex vi termini,* against all men, whether vested with political power, or mere private individuals; and the power of the sovereign would thus be limited, which is contrary to the hypothesis.

The theory also involves the denial of moral distinctions as commonly understood. For the term "rights," in its ordinary and proper sense, connotes the quality of rightness, and therefore refers to, and implies some standard of right and wrong by which the validity of rights is to be determined. To assert, therefore, that rights rest for their existence exclusively upon the will of the government is to identify that will with the standard referred to, and to assert that conformity or non-conformity to it, of itself constitutues right and wrong; which is in effect to deny the existence of any natural standard; for whatever the standard of right may be, it must necessarily be paramount, to and exclusive of any other.

Indeed, apart from this consideration, it is impossible to conceive of any ground upon which the principles of justice, or those principles which relate to rights, can be denied, and at the same time any other moral principles admitted;

for these, of all moral convictions, are the most clear and definite, and apparently the most certain; and it would therefore seem that they must constitute the last stronghold of morality to be surrendered, and that, if the conception of rights, so universal and profound, is a delusion, *a fortiori* our other moral convictions must be so.

Accordingly, Hobbes, as we have seen, expressly asserts that the will of the government is the supreme standard of right; and that the terms "right" and "wrong," "just" and "unjust," signify nothing more than conformity, or non-conformity to its will; and Bentham and Austin in effect assert the same proposition. For though they hold that utility constitutes the essence of right, yet they also assert that it is too uncertain and indefinite to serve as a practical standard; and that of necessity, therefore, the government must be the sole and supreme judge of what utility may require.

The difference, therefore, is only in the manner in which they arrive at the same conclusions,—Hobbes, for that purpose, inventing the fiction of a social compact, and Bentham and Austin making use of the theory of utility; for they both in the end assert that the will of the sovereign is the supreme rule, and that the obligation of conforming to it is paramount to every other.

So paradoxical, however, is this, and the conclusion as to the non-existence of rights, that the legists generally, since the time of Bentham, have found it necessary, apparently, to recede somewhat from these extreme, but logical views upon the subject, or at least to explain and modify them in such a manner as to be less shocking to the common sense of ordinary persons.

Accordingly, Austin and the later writers of his school assert a distinction between *legal* and *moral* rights, and thereby seem to admit the existence of natural rights of a certain kind. But they are careful to explain and to insist that *such rights are not rights in a proper sense, but mere moral claims*, which the party interested is not at liberty to enforce, and which all, including the state, are at liberty to violate. *In effect, therefore, they assert equally with Bentham that there are no rights but legal rights, and that it is these alone which the courts undertake to enforce, or with which the jurist is in any way concerned.*

CHAPTER V.

OF THE RECENT ENGLISH JURISTS.

§ 1. The theory of Austin has never been received by the jurists of other countries; and, indeed, as Sir Henry Maine remarks, there seem to be "no signs of its being known on the continent at all." But in England it is now generally accepted; and, indeed, is there so firmly established as to have put a stop almost entirely to all independent investigation in jural science. The result has been, that the works of the recent English jurists, which we are about to examine, will be found in the main to consist of mere glosses or commentaries on the views of Austin; and the value of this literature must therefore depend upon two considerations, namely, the merit of Austin's work, and the greater or less success with which it has been reproduced by the writers referred to.

The writings of Austin present three characteristic features, by which the merit of his work is to be judged. These are, his theory, as to which, as this work is almost wholly devoted to its consideration, nothing further need be said here; his method; and the use he has made of the material furnished by the Roman Jurists, or rather by the modern German writers on the Roman Law.

With regard to the Roman Law, it will be sufficient to say that it furnished a favorable subject for the exercise of Austin's remarkable analytical genius; and that, in consequence, though his views are distorted by his peculiar theory, his analysis of the conceptions of the Roman jurists is of the greatest interest and utility. And it is but just to admit that, in this respect, the merits of Austin's work have been fairly reproduced by the later writers of his school. We may, therefore, pass at once to the consideration of his method.

The method of Austin can be described only by saying simply that it is strictly logical; but, without explanation, this expression will perhaps carry with it but little significance to the average reader. The method consists in the accurate statement or formulation of first principles, and in reasoning accurately from proposition to proposi-

tion, precisely as in geometry. Hence, such reasoning has been called, by those who would depreciate it, geometrical or mathematical; and, though the expression is improper,—because the terms used can be applied with propriety to geometry or mathematics only,—yet the idea intended to be conveyed is correct: for there is, in fact, no essential distinction between geometrical, or mathematical, and other kinds of deductive reasoning,—the superior certainty of the former being wholly due to the greater definiteness and accuracy of the terms used. The same method, therefore, that applies to mathematics is equally applicable, and,—though fallen into disuse,—equally essential, to the moral sciences generally; in which the connection between the conclusions reached and the premises is equally certain as in the mathematics; so that, in fact, all true reasoning is demonstrative or apodictive. Accordingly, we find in Austin's reasoning,—and, this is its distinguishing characteristic,—the closest resemblance to that of Euclid and other geometricians. And in this he differs from the great mass of writers, ancient and modern; for it is a fact, undoubtedly true, though but little appreciated, that men of great logical genius, like Hobbes and Austin, are as uncommon as great poets, or great generals, or great statesmen.

Hence, naturally, it has resulted that the peculiar merit of Austin in this respect has not been reproduced in the works of the later English jurists, who have altogether failed to appreciate the nature and value of his method, and while accepting generally his conclusions have not hesitated to reject such as do not suit them; though, in fact, all the points of his theory are so bound together by the iron chain of his logic, that not one can be rejected by itself, and though the necessity of rejecting any one of them must be taken as a *reductio ad absurdum* of the whole theory.

SIR HENRY MAINE.

§ 2. Of the truth of these observations, the views of Sir Henry Maine offer a striking illustration. The historical works of this author are interesting and valuable, and they are distinguished by the extent of knowledge displayed, and by the fairness with which facts are ascertained and stated, without regard to their consist-

ency or inconsistency with the preconceived theory of the author. His reputation as a historian is, therefore, well deserved. But it must be said of him, as was said of Puffendorf by Leibnitz, that he was *virum parum jurisconsultus et minime philosophus.* For the test of merit in scientific jurisprudence and philosophy generally is consistency, and capacity to perceive clearly the significance of the facts with which the author deals; and in this he was deficient; as may be sufficiently shown by reference to his views on two important points, selected out of many others that might be cited.

(1.) He accepts and formally endorses the theory of Austin; but at the same time he admits, and even takes great pains to prove that it is historically false, or in other words, that it is not founded on fact.

"Nobody," he says, (alluding to what he calls the "remarkable analysis of legal conceptions effected by Bentham and Austin,") "who has not mastered the elementary parts of that analysis, can hope to have clear ideas of law or jurisprudence." And this analysis, he says, "tallies exactly with the facts of mature jurisprudence, and with a little straining of language may be made to correspond in form with all law, of all kinds, at all epochs." But, he adds, there are certain errors "into which it is apt to lead us on points of historical jurisprudence"; for "it is curious that the further we penetrate into the primitive history of thought, the further we find ourselves from a conception of the law which at all resembles a compound of the elements which Bentham and Austin determined."

"Without the most violent forcing of language, it is impossible to apply these terms—*command*, *sovereign*, *obligation*, *sanction*, *right*—to the customary laws under which the Indian Village communities have lived for centuries, practically knowing no other law civilly obligatory." "Nor in the sense of the analytical jurists is there right or duty in an Indian Village community." "And hence, under the system of Bentham and Austin, the customary law of India would have to be called *morality*—an inversion of language which scarcely requires to be formally protested against."[1]

But he concludes: "Whenever you introduce any one of the legal conceptions defined by the analysis of Bentham and Austin, you introduce all the others by a process which is apparently inevitable. No better proof could be

[1] Village Communities, 66-68.

given that, though it be improper to employ these terms —*sovereign, subject, command, obligation, right, sanction* —of law in certain stages of human thought, they nevertheless correspond to a stage to which law is steadily tending, and which it is sure ultimately to reach."[1]

The effect of which in plain language is, that Bentham's and Austin's conception of the law has never in fact been historically realized; but is to be regarded merely as an ideal towards which the law is tending, and which it is ultimately to reach; or, in other words, that the theory is not a true conception of the law as it is, or as it ever has been, but of the law as the author thinks it ought to be, and as he thinks it is tending to become, namely,— a mere collection of statutes.

Of this new theory, the only proof adduced by the author is the coherency of Austin's argument, or, in other words, the logical and therefore necessary connection between his conclusions and his assumed premise, than which he thinks "no better proof could be given." But obviously this conclusion is illegitimate; for in deductive reasoning, however conclusive be the argument, the conclusion is merely hypothetical, and its absolute truth must depend upon the truth of the premise assumed; which, in this case, is that all law is in fact a mere expression of the legislative will. Hence, the conclusion reached by Sir Henry Maine, that this is not the case, must be taken as a complete refutation of Austin's theory. And this, at times, he himself seems to realize. "There is," he says, "such wide-spread dissatisfaction with existing theories of jurisprudence, and so general a conviction that they do not really solve the question they pretend to dispose of, as to justify suspicion that some line of inquiry, necessary to a perfect result, has been incompletely followed or altogether omitted by their authors."[2]

His own theory, that the statutory form is the ideal to which the law is tending, although to some extent rendered plausible by existing notions in England, is utterly without verification; and fortunately its realization is as impracticable as it would be disastrous to the welfare of mankind.

(2.) The remaining point to which we will allude is the view taken by Maine of the law of nature, which, like other modern English jurists, he looked upon as a "theory plausible and comprehensive, but absolutely unverified."

[1] Id. 69, 70.
[2] Ancient Law, Chapter V.

This opinion, however, seems to have arisen from a misconception, on his part, of the origin and meaning of the conception of the *jus naturale* or law of nature; of which he says: "The Roman juristconsults borrowed from Greece the doctrine of the natural state of man and natural society, anterior to the organization of commonwealths governed by positive laws;"[1] in which doctrine he seems to think the origin of the conception is to be found. But the term *jus naturale*, as used by jurists, or as it should be translated, *natural right* or *law*, has no sort of connection with the hypothesis of a state of nature. As used by the Roman jurists, it is but another name for the *jus gentium*, which is defined by them as being the law (*jus*) "which natural reason has established among men," and which "is observed generally among all peoples"; and is so called "as being the law which all peoples use." And this conception is obviously taken from the "*nomos koimos*" or "common law" of Aristotle, which precisely corresponds with it, and which is defined by him precisely in the same way, viz: as being the law "which is conformable merely to the dictates of nature," and which is "recognized among all men." That in Aristotle's mind it had no reference to the admittedly impossible hypothesis of a state of nature, is sufficiently shown by his definition of man as being merely a political animal (*zoon politikon*), and by his conception of natural right or justice as being part of the law of a state; which accords precisely with the opinion of Hobbes, that "the law of nature is part of the civil law of all commonwealths of the world." So also the Roman jurists regarded the *jus gentium* or *jus naturale*, not as the code originally existing in a state of nature, but as part of the actual law, or, as elsewhere said by the author himself, "as something belonging to the present, something entwined with the existing institutions."[2]

This, as we shall see, has also been uniformly the conception of our own jurists, prior to the time of Austin; though with us the term *law of nature* is seldom used, but more generally in its place the term *reason*. For, as said by St. Germain, "it is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the law of nature, and what not. But * * * when anything is grounded upon

[1] Ancient Law, 54, 68, 70, 71.
[2] Id., 70-71.

the law of nature, they say that reason will that such a thing be done; and if it be prohibited by the law of nature, they say that it is against reason, or that reason will not suffer it to be done." (Doctor and Student, Mitchell, Clark & Co., Cincinnati, 1874.)

And this gives the precise meaning of this much-abused doctrine of the law of nature, which simply asserts that reason, justice, or right is part of the law,—a proposition almost universally asserted by jurists, and of the truth of which there cannot be any manner of doubt. And of its truth, indeed, no more striking proof can be given than in the observations of Sir Henry Maine on the part it performed in the development of the Roman law; viz, that "the progress of the Romans in legal improvement was astonishingly rapid as soon as stimulus was applied to it by the theory of natural law"; and, that "he knew of no reason why the law of the Romans should be superior to that of the Hindoos, unless the theory of natural law had given it a type of excellence different from the usual one."[1]

§ 3. Mr. Harrison's views of Austin's theory—as elaborated in several essays in the Fortnightly Review—are merely a somewhat exaggerated form of those of Sir Henry Maine, and are cited here in order to bring out more strongly the inconsistencies of that author. In his opinion, as in that of Sir Henry Maine, Austin's theory "still remains to Englishmen the foundation of rational jurisprudence"; and "in Austin, English law found the first conception of an abstract jurisprudence." But the theory, he thinks, "may be reduced to a very small number of very simple propositions; and the truth of these propositions has been asserted in much too absolute a way. For * * * they depend for their truth on assumptions which are very far from being universally true in fact, and they require qualifications which very much reduce their scientific value as social laws."

From this, it may be observed, it is obvious that the author has failed to appreciate the essential characteristics of Austin's method of reasoning; which, in fact, is the only method that can be deemed truly scientific. For, in logic, if a proposition be not altogether true, it is to be regarded as false; and it is logically absurd to say that its truth can be exaggerated, or that it can be asserted in "too absolute a way." So, if Austin's conclusions are

[1]Ancient Law, 56, 75.

not wholly true, either his reasoning is wrong or his premises untrue; and in either case his conclusions are wholly unwarranted, and must, therefore, be wholly rejected, unless some other line of reasoning can be found to support them.

This is attempted by Mr. Harrison, but hardly with success. His view is that Austin's definition of the law and of sovereignty, though absolutely unverified, and indeed unsusceptible of verification, must, for some reason not very apparent, be accepted as a convenient hypothesis. "The lawyer," he says, "has to assume law as resting on the single force of sovereign authority; whilst in other branches of thought we could only assume this hypothesis with the certainty of ending in confusion and positive error. *Politically* and *socially* speaking, law rests on something more than force. *Juridically* speaking, it rests on force and force alone." And he adds: "As Sir Henry Maine shows, the theory excludes from view the mass of historical conditions which, in almost every society known to us, gives sovereignty its social efficacy and its distinctive character." But, "on the other hand, all this is just what the lawyer has to exclude from his view by a scientific artifice." "The result is that the Austinian conception of sovereignty is a perfectly sound conception when read in the light of the assumptions by which it is qualified and limited to the sphere to which it belongs. * * * But as a general proposition of human society, without the prefixed qualifications, it is quite assailable and not very intelligible. A real step was taken in the history of scientific jurisprudence when Sir Henry Maine pointed out the conditions under which the definitions of Austin must be read—conditions, I think, rather ignored by Austin himself."

In which last opinion the author is doubtless right. Austin always had a clear and distinct meaning, and meant what he said; and had it occurred to him that his theory needed such qualifications, he would doubtless have abandoned it. Nor is it easy to understand how it can still be adhered to by Mr. Harrison and Sir Henry Maine. For their proposition, in plain words, is simply the obviously untenable one, that the theory is, in fact, false, but, for some inconceivable reason, must, "by a scientific artifice," be regarded by lawyers as true; or, in other words, be made use of as a convenient legal fiction.

§ 4. Mr. Pollock criticizes Austin for devoting so much of his work to the theory of morality, and in this Mr. Harrison concurs.

"I think it a mistake," the former says, "to preface the study of legal conceptions by an exposition of transcendental ethics, and not less a mistake to preface it, as Austin did, by an exposition of the principle of utility. I do not see that a jurist is bound to be a moral philosopher more than other men." "In other words, our English school holds that the absolute law, which is or should be the origin or pattern of all existing law—*naturrecht*, as the Germans call it,—either does not exist, or does not concern lawyers more than any one else."[1] But in this Messrs. Pollock and Harrison are less logical than Hobbes, Bentham, and Austin, all of whom clearly perceived that their conception of the law, and the resulting conception of absolute sovereignty were, in fact, not only inconsistent with the notion of the existence of natural rights, or natural justice,—which is admitted by Mr. Pollock,—but also with the conception of right and wrong as commonly conceived. For, as we have observed,[2] the very conception of rights connotes, and necessarily implies, the existence of a standard of right and wrong; and hence, to assert that rights are the mere creatures of the sovereign will, is to assert that that will is the paramount standard of right and wrong. He, therefore, who asserts the definition of the law as being a mere expression of the sovereign will, logically asserts the absolute right of the sovereign over the property, the liberty, and the lives of its subjects, and denies the existence of all human rights, and, consequently, of all moral distinctions. To Hobbes, Bentham and Austin,—as it must be to all logical minds,—it was impossible to retain their confidence in the premises assumed without asserting these conclusions. And, especially with reference to natural justice, was this necessity apparent to them. For, to quote Bentham, "there is no reasoning" in any other way "with fanatics armed with natural rights." For, as they clearly perceived, there is no way of separating morality from law otherwise than by abolishing it, and to assert the existence of morality in any other than the peculiar form in which it is asserted by them is to abandon what was regarded

[1] Essays in Jurisprudence and Ethics.
[2] Ante, p. 35.

by them as an essential and fundamental part of their theory.[1]

§ 5. Mr. Markby is one of the most pronounced adherents of Austin's theory, which he regards as "pretty well established," and as "generally accepted by English jurists." But he agrees with Mr. Harrison and Sir Henry Maine, in asserting that the theory is not historically verified; and also with the former and Mr. Pollock, in asserting that the theory does not rest "upon any theory of religion or morality," but "might be accepted by a Hindoo, by a Mohammedan, or by a Christian,"—propositions which, as we have seen, in effect amount to a repudiation of Austin's theory.

But perhaps the most radical departure from Austin's views is the proposition, asserted by Mr. Markby, that there are principles or rules of decision habitually used by the courts which are no part of the law, and which do not become such by reason of the decision. And in this, as we shall see, Mr. Holland in effect agrees.

"There are cases," says Mr. Markby, "in which rules are adopted and acted on by judges which have not hitherto existed as law, and which judges do not even pretend to make law by acting upon them. In other words, I think judges constantly arrive at a point at which they refer to a standard which is not a legal one. This takes place frequently in modern English law." And he adds: "The very notion that a rule can by any possibility be transformed into law by judicial recognition is quite a modern one, even in England; and nothing of the kind has ever been recognized except in England, and in countries that have formed their legal systems under the influence of England. * * * And yet we find that everywhere judges unhesitatingly refer to the principles of jurisprudence as generally recognized, to the principles of equity, and to the guidance of common sense, and they take their guidance as willingly from these sources as from any other."

"This admission seems to place the disciples of Austin

[1] "The first ray of light," says Dumont, "which struck the mind of Bentham in the study of the law, was the perception that *natural right*, the *original pact*, the *moral sense*, the *notion of just and unjust*, which are used to explain everything, were at bottom nothing but those innate ideas of which Locke has so clearly shown the falsity." Introd. to the Principles of the Civil Code. And in the same way, as we have seen, the terms *conscience*, *moral sense*, and similar terms, were regarded by Austin as mere cloaks for hypocrisy and sinister interest. (Infra, p. 62.)

in a difficulty. It seems to show that Austin's conception of law is not adequate, even as applied to modern English law; and that it is equally inadequate, if we look into our own past history, or into the condition of law in other countries. In short, it seems to show that Austin's conception of law fails as a general or scientific conception."[1]

And so it does, though the author attempts unsuccessfully to reconcile the contradiction. For the essential characteristic of Austin's theory is not merely to restrict the term, law, to statutory enactments, legislative or judicial, but also to extend its application so as to include all rules and principles of judicial decision; and to hold that decisions may be made, or, in other words, that rights may be determined, by principles not forming part of the law, such as those of jurisprudence, or natural justice, or equity, is to surrender his whole position.

§ 6. Mr. Holland accepts all the conclusions of Austin. "The sovereign part of the State," he says, "is omnipotent"; "an act is, strictly speaking, never unconstitutional unless it is also illegal, and can never be either if it is the act of the sovereign power." Rights are created by the sovereign will; "the immediate objects of law are the creation and protection of legal rights"; "that which gives validity to a legal right is in every case the force which is lent to it by the State"; "international law can be described as law only by courtesy." And the same is true of constitutional law.

Nevertheless, he abandons the definition of Austin, that the law is merely an expression of the will of the State,—which is the premise from which all his conclusions are deduced,—and adopts an essentially different definition; which is, that "a law is a general rule of external conduct enforced by a sovereign power," and *the* law "an aggregate of laws." To this definition there is no objection, except that it is not, in a true sense, a definition at all; in which respect it differs from that of Austin, which is a true or essential definition. From the latter, all the conclusions of Austin's theory may be logically deduced; but they cannot be deduced from Holland's definition. Nor, indeed, can anything be inferred from it; for it is equally consistent with Austin's theory, and also with that which asserts that justice, or natural right, or,—to state it in the form most obnoxious to the modern English jurist,—the law of nature is, as Hobbes asserts,

[1]Elementary Law, §§23-4.

a part of the law; and with this Austin's definition is altogether inconsistent.

Hence, in abandoning Austin's definition, Holland loses the sole foundation upon which Austin's, and his own conclusions rest; and in his system they remain mere gratuitious assumptions, without even an attempted argument to support them.

Mr. Holland also dissents from Mr. Austin's proposition that custom does not become law until it is recognized by the courts.

"The state," he says, "through its delegates, the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these the Courts give operation, not merely prospectively from the date of such recognition, but also retrospectively; so far implying that the custom was law before it received the stamp of judicial authentication. The contrary view supported by Austin is at variance with fact. * * * Not having a code ready at their hand, with rules for every emergency, they [the judges] have invoked, as the *ratio* of their decisions, not only equity, or the generally acknowledged view of what is fair, and previous decisions of the Court, upon the faith of which it is to be presumed that people have been acting, but also customs established among and by the people at large, as presumably embodying the rules which the people have found suitable to the circumstances of their lives. The Courts have, therefore, long ago established as a fundamental principle of law, subject, of course, in each case to many restrictions and qualifications, that, in the absence of a specific rule of written law, regard is to be had, in looking for the rule which governs a given set of circumstances, not only to equity and to previous decisions, but also to custom."[1]

This, in effect, is to assert with Hobbes and jurists generally, that natural right—of which equity is but another name — as also custom, is part of the law; but it is inconsistent with Austin's theory, and amounts to a repudiation of it.

§ 7. Mr. Amos is also a pronounced admirer of Austin. To him was due, he says, "the deliverance of the law from the dead body of morality"; and he "may be said to have been the true founder of the Science of Law, if indeed such honor could ever belong to any one man";[2] or, in other words, to him "the conscious establishment

[1]Jur. 48 9. [2]Scientific Law, 4.

of the legal science must properly be attributed."[1] He also unequivocally accepts the definition of Austin: "A law," he says, "is a command of the Supreme Political Authority of a state,"[2] and the law is a body of such commands."[3]

But it follows from this definition, and Austin emphatically asserts, that neither International nor Constitutional Law is law in the proper sense, but each is nothing more than positive morality. It would seem, therefore, that Mr. Amos, in accepting his definition, committed himself to this proposition. But such is not the case.

"The true lesson," he says, "enforced by the seemingly impracticable phenomenon presented by the body of rules forming the bulk of what is known as the Law of Nations, * * * is, that the distinguishing characteristics of true law must be sought for somewhere else than in the nature of the authority from which it proceeds, and in the certainty of the punishment by which its infraction is intended;"[4] and accordingly he propounds the question: "Whether the definition of the term law, as given by the most recent and celebrated school of English legal writers, is not based on too restricted a conception of the phenomena to which it relates?"[5]

On the same grounds, he is also of the opinion with reference to Constitutional Law, that, though "as a matter of ethical or historical research, the use of the word 'morality' is, neither inappropriate nor uninteresting," yet, "just as in the parallel case of International Law, the rules in question are as unlike as possible to moral principles and maxims, and are as like as possible to genuine laws."[6]

There could not be a more perfect demonstration of the falsity of Austin's definition, or a more conclusive refutation of the theory based upon it, than this; but apparently a *reductio ad absurdum* is not regarded by Mr. Amos as a legitimate mode of argument.

§ 8. One other case will be referred to as illustrating our thesis. The doctrine of absolute sovereignty is established, or rather the attempt is made to establish it, by Hobbes and Bentham and Austin, by extended and elaborate reasoning. But lately a shorter method has been discovered, which I find attributed to Professor Huxley, in a collection of essays lately published, under the attractive but misleading title of "*A Plea for Liberty*,"

[1] Id. 8.
[2] Jurisprudence, 73.
[3] Id. 1.
[4] Science of Law, 324.
[5] Id. 322.
[6] Id. 115.

and which, I may say in passing, is calculated to remind one of old Joab's treatment of his comrade, Amaza, when he took him by the beard to kiss him, saying: "Art thou in health, my brother?" and stabbed him under the fifth rib.

It is as follows:

"The power of a State may be defined as the resultant of all the social forces acting within a definite area. 'It follows,' says Professor Huxley, with characteristic thoroughness of logic, 'that no limit is or can be set to State interference.'"

From this the author proceeds to argue, with Hobbes and Austin, that "the power of the State is absolute"; that "it still remains unlimited despotism, as Hobbes assumes"; "that rights, when created, are created by the strong for its own good pleasure"; and so on, to all their conclusions.[1]

But, obviously, the argument consists of a mere rhetorical artifice, and can hardly be accepted as a satisfactory substitute for the stalwart logic of Hobbes and Austin. The term *forces*, in its primary sense, denotes merely physical forces. These operate under fixed laws, from which, if the direction and intensity of any number of forces operating on any point are known, the resultant can be mathematically determined. But nothing of this applies to human powers, or to social or moral forces. As to these, the expressions *forces, and resultant of forces*, are purely metaphorical. In a direct sense the proposition, if it has any meaning at all, amounts only to the platitude that the actual power of the government is, in fact, the preponderating power in the State. It says nothing with reference to the rightful power, or right of the State, which is the only material point. Hence its fallacy consists in the neglect to observe the ambiguity of the term power, to which I have already alluded, (*supra*, *p.* 24) and in thus confounding *mere power*, or might, with *rightful power*, or right. In the premises, the term is used in the former senses; in the conclusion, in the latter; and thus the argument, with all its supposed "thoroughness of logic," presents a transparent case of that most common and most destructive of all fallacies, an ambiguous middle.

[1]Strangely enough the preface to this work is contributed by Mr. Herbert Spencer, who is thus apparently made to stand sponsor for a doctrine, doubtless as abhorrent to his soul as it was to that of Aristotle; in whose view, "to intrust man with supreme power was to give it to a wild beast."

CHAPTER VI.

REVIEW OF THE AUSTIN THEORY OF JURISPRUDENCE.

§ 1. The theory of Austin, as we have observed, rests wholly upon his definition of the law, as a first principle. This was taken by him from Bentham, who in turn took it from Blackstone, — who as a lawyer ought to have known better; and neither of them seem ever to have suspected that any doubt could be entertained of its truth. But in fact,—as perhaps sufficiently appears from what has been said, and as will be more fully shown in the sequel,— it is an essentially false description of the law and owes its plausibility solely to the verbal identity of the terms, "*a law*," and "the law"; of the former of which only is it a correct definition. For the term, "*a* law," in our language commonly denotes merely a statute or act of legislation; but the term "*the* law" denotes that aggregate of rules and principles by which in every State the mutual rights and obligations of its citizens are regulated, and the decisions of its Courts, in matters of private right, determined; and which in other languages than our own is termed *Jus*, *Droit*, *Recht*, or by some other term equivalent to our word *Right*.

To infer from this usage that the law consists merely of right or justice would,—as Austin and his school have not failed to insist,—be unphilosophic; but it is equally illegitimate to assume,—as they do,—from the different usage of our own language, that the law consists entirely of statutes or laws; for obviously the question is one that can be determined only by an analysis and examination of the law as it actually exists.

To this test the question must ultimately be submitted; but it usually, and perhaps universally happens that a false theory carries in itself, in the inconsistencies or absurdities logically involved in it, the seeds of its own destruction; and thus generally, to logical minds, the readiest means of refuting it is to develop its logical consequences.

This, in the case of Austin,— as may be seen by reference to the statement of his theory heretofore given,[1]— has, in the main, been effected with wonderful logical in-

[1] *Ante*, p. 34 *et seq.*

trepidity, by the author himself; but there are certain points with regard to which he seems to have failed to perceive the consequences involved in his views. These relate (1) to the doctrine of sovereignty, (2) to the nature of judicial decisions, and (3) to the nature of rights, and will be considered in the order stated. Afterwards (4) it will be shown that, by an apparently slight modification of Austin's theory, already suggested by Markby and Holland, it can be reconciled with truth and reason, and all objection to it, except perhaps on the score of impropriety of language, removed.

§ 2. (1) Two arguments are used by Austin to establish the absolute right or power of the sovereign, or supreme government, viz: the argument from utility, and the argument from the definition of the law. The former has already been touched upon in our review of Hobbes, and it will be sufficient to repeat here that while it clearly establishes the necessity of government, and also that it should be vested with all the powers or rights necessary and proper to the efficient performance of its functions,—which must necessarily be great,—it does not establish, or tend to establish, that these should be absolute or unlimited. On the contrary, with reference to the rightful power, or right of the government, it seems to establish the proposition of Rutherford, that the "civil power is in its own nature a limited power: as it arose at first from the social union, so it is limited by the ends and purposes of such union, whether it be exercised, as it is in democracies, by the body of the people; or, as it is in monarchies, by one single person.[2] And with reference to its actual power, the most obvious dictate of utility is that it should, as far as practicable, be limited to such power as may be necessary for the performance of its functions.

[2] 2 Institutes of Natural Law, p. 393.

Hence, it is obvious, the doctrine of absolute sovereignty—if it can be maintained—must rest upon the other argument urged by Austin, namely, the argument from the definition of the law, of which it must be regarded as a mere corollary.

This definition, as I have said, is obviously untenable; but for the present, as it is proposed to examine merely the consistency of Austin's famous argument,—which not only convinced himself, but has carried conviction to the minds of two generations of English jurists, and is still triumphantly regarded by them as the rock upon which

their faith is founded,—the definition will be assumed to be true.

The argument is in effect that it follows (*ex vi termini*) from the definition of the law, as consisting of the commands of the sovereign, that the power of the sovereign cannot be limited by law, or, in the language of Austin, "is incapable of legal limitation.[1]"

In this proposition, it will be observed, Austin uses the term, sovereign, as denoting merely the "*supreme government*," or supreme political organization of a state, (in his own language "the monarch," or "the sovereign number in its collegiate and sovereign capacity"); and, consequently, the law is to be regarded as consisting of the commands of this sovereign, *i. e.*, of the supreme government, whether consisting of a monarch or a sovereign body.

Thus construing the terms, the argument is obviously conclusive, for it simply asserts that the power of the sovereign or supreme government cannot be limited by its own commands,—a proposition universally true, not only of sovereigns, but of all persons,—real or fictitious,—whatever. But the proposition,—which, thus construed, is entirely innocent, and, indeed, without significance,—is habitually used by Austin and his school, as though equivalent to the proposition that the power of the government is unsusceptible of being limited by statutory enactments,—a proposition essentially different, and, at least to an American, obviously false; for in this country the powers both of the Federal and of the State governments are, in fact, limited by organic statutory laws, imposed by Constitutional conventions, or constituent assemblies; and it cannot be doubted, either that our governments are supreme governments, or that our constitutional enactments are statutes or laws in the strictest sense.

This difficulty is, indeed, considered by Austin, and solved to the entire satisfaction of himself and his followers; but a very brief examination of his argument will be sufficient to show that it is untenable, and that it in fact presents a transparent case of *ignoratio elenchi*; of which the most common, and dangerous form is,—as is here illustrated,—to use a conclusion, true only in a particular sense of the terms in which it is stated, as though applicable to other cases where the terms are used in a different sense.

Here, the ambiguity is in the term, sovereign; which is

[1] Suprr p, 35.

commonly used to denote, not only the supreme government, or political organization of the state, but also the state, or the people, as distinguished from the government. These two senses of the term are obviously confounded in the argument of Austin. For, bearing in mind this double sense of the term, there is nothing contradictory in saying that the supreme government may be at once "sovereign" and "not sovereign"; *i. e.*, "sovereign," as being the supreme government, but "not sovereign," as being the state; or, in saying that the government, though sovereign, is subject to a higher sovereign: namely, the state; or, in saying that its powers may be limited, as in this country, by statutory laws imposed by constitutional conventions. Nor is it an answer to this proposition to say,—as is undoubtedly true,—that a constitutional convention is itself a legislative assembly, or, as Austin expresses it, "an extraordinary and ulterior legislature," (Jur. 254); for it is not true that such a convention is a government, even when in session; still less after it has been dissolved, and its members mingled with the body of the people.

It is, however, a cardinal point in the theory of Austin that a *sanction*, or liability to punishment, is an essential element in a law; and hence it is argued that, as constitutional laws have no power behind them to inflict punishment for their violation other than the government itself, they are not in fact laws, except so far as the government may choose to adopt them. But, admitting for the sake of the argument, that the premises are correct, the conclusion, it can be readily shown, does not follow.

Here, also, the fallacy lies in a misuse of the terms sovereign and sovereignty, which will, therefore, require further explanation. These terms, as we have seen, were originally applied to the case of a single sovereign or monarch; and in this sense,—which is their only proper sense,—their meaning is clear and distinct; a sovereign is a monarch, in whom is vested the *highest*, or supreme power in the state; and sovereignty is the power vested in him. But the application of the term, as we have seen, was extended by Hobbes to aristocracies, or sovereign bodies; and, since his time, has been further extended so as to embrace such composite governments as those of England and the United States; and recently it has even been used to denote mere abstractions that are not governments, as when, for instance, we speak of "the sovereignty of the people,"

or "of the state," as distinguished from the government, or of "the sovereignty of the law," or "of justice," or of "the sovereignty of public opinion"; all of which, even those applied to governments, are improper or figurative senses of the terms. For when the supreme government consists of more than one, whether it be a simple assembly, or a more complex organization, it is obviously what is called a corporation or body corporate; which is a fictitious or imaginary being different and distinct from the individuals of which it is constituted. This conception is, indeed, a useful one in the law, where the subject of corporations constitutes a leading topic; and the analogy between such fictitious persons and real persons is so close, that nearly every proposition that may be predicated of the one will be true also of the other. But it is, nevertheless, unless carefully used, a very dangerous one; for there is obviously a point beyond which the analogy breaks down, and to carry it further would be a source of error.[1]

And of this, the notion of the indivisibility of sovereign power,—which is founded wholly on the conception of government as a corporation, or fictitious being,—is a conspicuous instance. For while it is obvious that the power of a sovereign, in the proper sense, or a monarch, cannot be divided, it is equally obvious that, in the case of all other kinds of sovereigns, including simple sovereign assemblies, sovereign power is not only divisible, but is in fact necessarily divided. For the power of which we are treating is human power, or power vested in some actual human being; and hence a sovereign power is to be defined simply as the power of an officer or department which has no superior, or which is not subordinate to any other; and there must, therefore, be as many sovereign powers,

[1] The celebrated case of Dartmouth College vs. Woodward, (4 Wheat. 518,) furnishes a striking instance of pushing this analogy too far. In that case the principle was asserted that a charter to a corporation is a contract, which, under the constitutional provision forbidding the enactment of laws impairing the obligation of contracts, could not be altered by the State; and the principle was held to apply to the charter of the plaintiff,—an eleemosynary corporation. But it is clear that, strictly speaking, a corporation,—which is a purely fictitious or imaginary being,—cannot itself have any rights, and that what we call the rights of a corporation are, in fact, the rights of its stockholders, creditors, or other individuals beneficially interested; and hence that the constitutional provision can have no application, if there are no such persons,—as was in fact the case before the Court. Hence in that case, —as in all others where property has no other owner, the beneficial interest in the property of the corporation was in the State, and it could deal with it as it pleased. Or, to state the proposition more generally, all property held for charitable purposes,—at least, after the death of the donors,—belongs to the State, and may be disposed of by it according to its own views of what is right and proper.

—or, we may say, sovereigns,—as there are co-ordinate officers or departments in the government. Thus, in the American governments sovereign power is vested in the President or Governor; also in Congress or the Legislature, and also in the judicial department; and these powers are not only separate, but essentially different in their natures, and independent of, and co-ordinate with each other. Each department is therefore supreme or sovereign in the province allotted to it; and there is no reason, except for convenience, why these different, separate, independent, supreme powers should be regarded as one. We may, indeed, if we desire, thus conceive of the government as a fictitious or artificial person, exercising these various functions through its several departments; but back of this conception lies the fact that this artificial person can exercise no functions whatever, except alternately through one or the other of the supreme political organizations, or, as they may be called, sovereigns, of which it is constituted. Hence, if we would avoid error, when we use the terms sovereign and sovereignty, in any other than their proper sense, as applying to a monarch, or single sovereign, it is always to be remembered that we are dealing with a purely fictitious notion, the creation of our own minds, which has no counterpart in nature; or, in other words, that we are dealing with the power, not of actual men,—with which alone jurisprudence is ultimately concerned,—but with that of a fictitious or ideal being, without intelligence, conscience, or will. For otherwise, according to the peculiar mode in which we may choose to construct our artificial sovereign, —and, with reference to every complex government, our ability to vary his nature is unlimited,—any number of the most contradictory conclusions may be reached,—as, for instance, in the case of our government alone, that the sovereign power is vested in the states, regarded as an assembly of fictitious persons or bodies politic, (which is Austin's notion); or in the states individually; or in the federal government, to the exclusion of the states; or in the people of the United States collectively; or—as held by a late writer on the constitution—in that class or number of people, or party, whose power at any time may happen to preponderate. In short, with the power of creating our premises at will which the use of fiction gives us, any conclusion desired may be established.

Of this, the argument of Austin, which we are examin-

ing—viz: that ordinances or statutes enacted by constitutional conventions are not laws, for lack of sanctions to enforce them,—is an instance. For independently of the fact that the observance of such laws is enforced by fear of revolution or rebellion, or of a constitutional change of the government,—which is a sanction essentially identical in nature with the sanctions by which individuals are impelled to obedience,—the proposition is otherwise obviously false. For, while we cannot punish the fictitious being which, in corporate governments, is conceived to constitute the sovereign,—and which, in the language of an eminent jurist, has neither a soul to be saved, nor a body to be kicked—we can punish the actual human beings in whom the power is in fact vested; that is to say, the President or Governor, (or in England the ministers of the Crown,) the members of the Legislature, and the judges; and it is very certain that, if these can be restrained by the fear of punishment, we need have no fear of our imaginary Leviathan.

Indeed, as we have seen, independently of this consideration, it is obvious that, except in the case of a monarchy, absolute political power is impossible. For from the nature of the case, as was very clearly perceived by Hobbes, to divide the sovereign or supreme political power between several individuals or departments is, of necessity, to diminish or limit it; for, in such case, the power of each officer or department is limited by that of the others; and, as each part is limited, it follows that the whole must also be limited. Hence, as I have said elsewhere, the maxim "*Divide et impera*" is as obvious a principle of political organization as it is of war or diplomacy; and, indeed, it is to the application of this principle that all improvement in political organization is due.

§ 3. (2) Upon the most cursory examination of the law, with a view of testing the accuracy of Austin's definition, we are confronted with the fact already alluded to, that it consists in the main of rules and principles established by precedent or judicial decision, and that laws in the ordinary sense, or statutes, constitute but a small and comparatively unimportant part of it; which would seem to be a conclusive refutation of the definition. But, as we have seen, Austin, to meet this point, asserts that the judges, in effect, exercise legislative functions, and that their decisions are, in their essential nature, statutes or commands of the sovereign made or enacted by the judges as its sub-

ordinate officers. It is clear, therefore, that here lies a crucial test by which the truth or falsity of the definition is to be determined, and that, if this proposition be found untenable, the definition must be rejected.[1]

A full discussion of this proposition would involve an examination of the nature of the judicial function, and of the doctrine of *stare decisis*, or of the authority of judicial decisions,—a subject of great interest, but which would demand a greater space than we can here give it. But, as fortunately the subject will be more or less familiar to the reader, it will perhaps be sufficient on these points to observe that the proposition is opposed to the uniform opinion of the jurists, both of our own and of the Roman law, as embodied in the maxim, *judicis est jus dicere, non dare;* that it is in conflict with the rule of *stare decisis*, as uniformly interpreted by the authorities of either law; and that it is subversive of the supposed distinction between the several functions of government, namely, the executive, the legislative, and the judicial, which has long since come to be received in political science as fundamental.

But such a discussion though interesting, is, I think, unnecessary here,—as the doctrine carries in itself its own refutation, and can be readily disposed of,—as we have seen is the case with other points of the theory,—by merely considering the consequences logically involved in it. Of these the most obvious are the following:

The doctrine in question is founded on the rule of *stare decisis*,—of which indeed it purports to be but an expression. It will therefore apply to the decisions of the Courts on the construction and effect of statutes, equally as to their decisions on other questions. Whatever doubts and conflicts may have arisen with reference to the application of the rule in other respects, it has never been suggested that there is any distinction to be made between its application to acts of the legislature, or ordinary statutes, and its application to rules otherwise established. Hence it follows that the ordinary legislature cannot enact a valid law as to matters of private right; for such law or supposed law cannot be enforced otherwise than by the Courts, and is, therefore, without a sanction,—which according to the theory is an essen-

[1] It is worthy of remark that on this point Austin differs from Bentham, who regarded this exercise of power by the judges as a usurpation. But Austin, with a clearer perception of the logical exigencies of the case, was compelled to invent the monstrous doctrine that the judges are, in fact, vested with legislative power.

tial element of a true law,—until it is so recognized; and, if the Courts fail to recognize it, or give it an erroneous construction, it can never become a law. In this respect, statutes stand in precisely the same category as customs or principles of natural right; which, according to the theory, cannot become law until adopted by the Courts.

Nor can it be consistently said by Austin and his followers that the judges *ought* to carry out the enactments of the legislature. For, according to their theory, *obligation* consists merely in the liability to, and fear of, punishment; and to say that a man *ought* to do or not to do anything, or is *under obligation* to do, or not to do it, means simply that the performance or non-performance of the act is imposed upon him by the fear of impending punishment; of which in this country, and generally in others,—except in a few extreme cases, which will not materially affect the question,—the judges have no cause to have apprehension; but rather it may be said that there is no other situation in life in which stupidity and even conscious injustice can be exercised with such entire impunity as on the bench.

Nor can there be any law of any kind binding on the judges. For, being vested with legislative power, they can, if they please, disregard the decisions of their predecessors, not only with impunity, but without blame. For the legislative power is, in its essential nature, an arbitrary power, and to be exercised according to the maxim *voluntas stet pro ratione,* and the rule applies, *leges posteriores abrogant priores.*

Nor is it any answer to this to say that the judges *ought* to follow the decisions of their predecessors. Most people indeed, think that they *ought* in general to do so, and they think also that customs, when rational, and also principles of justice and right, should be observed by the Courts; but, according to the theory, these are mere *moral* considerations with which the law is not concerned.

Hence, as the ultimate consequence of the doctrine, we must conclude that law is in fact impossible, and that the sole standard of men's rights must always consist in the fluctuating and unforeseeable opinions, or rather decisions, of the Courts; and this in fact, it is to be apprehended, is something like the condition to which the influence of this pernicious doctrine upon modern lawyers has reduced the law at the present day.

§ 4. (3) It is a proposition so often stated as to have become commonplace, and that has in effect been asserted in all the fundamental laws of our race, from Magna Charta to the last state constitution, that it is the function of government to establish justice, or, in other words, to secure the observance of private rights. Verbally this proposition is admitted by the Austin school of jurists; but in effect it is denied; for, according to their definition, a right is nothing more than the capacity or power conferred upon one by the state to control the actions of another, or of others.[1]

In his view and that of his followers, therefore, the sole essential element in a right is power over others, conferred by the state. Where this exists, whether such power be right or wrong, just or unjust, it constitutes a right; and without it no right can exist. In other words, in their view, the terms "*a right*" or "*rights*" and the adjective "*right*" have no community or identity of meaning, but are merely homonymous.

Sometimes indeed, as we have observed, Austin, and also other legists, speak of *moral*, as opposed to *legal* rights,—but we are plainly told that this is merely for the sake of conformity to common language. "Strictly speaking," he says, "there are no rights but those which are creatures of the law."[2] And Bentham is even more emphatic. "The word, rights," he says, "the same as the word law, has two senses; the one a proper sense, the other a metaphorical sense. Rights, properly so called, are creatures of law, properly so called: real laws give birth to real rights. * * * Natural rights are the creatures of natural laws: they are a metaphor which derive their existence from another metaphor." But obviously this is to leave out an essential element in the signification of the term "a right," or "rights," which in its proper, and universally received, as well as in its etymological sense, connotes or implies, as part of its essential meaning, the quality of rightness or rectitude;

[1] "A person has a right, when the law authorizes him to exact from another an act or forbearance * * * The capacity or power of exacting from another acts or forbearances is nearest to a true definition." Austin, Jur. 410. To the same effect is Amos, Jur. 79. Holland's definition is somewhat different, but, so far as bears upon the subject of discussion, in effect the same. According to it, a right is "a capacity residing on one man of controlling, with the assent and assistance of the state, the actions of another. That which gives validity to a legal right is in every case the force which is lent to it by the state." Jur. 8, 62.

[2] Jur. 354.

or, in other words, a right is not merely a power, but it is, *ex vi termini*, always a rightful power. Hence the so-called rights of Austin are not true rights, but merely what are called in the law actions; which are defined by the jurists, both of our own, and the Roman law, substantially in the same way.[1]

Hence, an obvious question presents itself. If it be assumed, as it is in effect assumed by this theory, that the notions of right and wrong, and of the just and unjust, as popularly conceived, are erroneous, why keep alive these delusions by transferring the use of the term "right" to another subject, to which, in its proper sense, it cannot apply, and which already has its appropriate term to denote it? Why not say at once that the law is concerned with *actions* only, and that it has nothing to do with rights of any kind? In this way the legists would rid the subject of all confusion, and would no longer delude people—and perhaps themselves—into the supposition that they are treating of rights, when they are not only treating of something essentially different, but actually denying their very existence; and the only conceivable reason why this course should not be pursued is that this sacred name, *rights*, and its correlatives, justice or right, serve as a convenient cloak which cannot be dispensed with without exposing the hideous deformity of their theory.

§ 5. (4) The above observations suggest a mode in which, by an apparently slight modification of the *legal* theory, it may be stripped of its objectionable features, and made conformable to truth and decency.

The definition of a law as an expression of the will of the state, if confined to the subject to which it relates, is unobjectionable; nor is there any objection—except that it is opposed to the more common usage—to denoting the aggregate of laws by the term, the law; nor is there any serious objection, beyond that of impropriety of language, to adopting the fiction of Hobbes, that whatever the sovereign permits he commands, and to thus extending the application of the term law so as to include not only laws

[1] "*Actio nihil aliud est quam jus persequendi in judicio quod alicui debitur*"; which,—as the term, *jus*, is used, in the Latin, to denote mere legal powers as well as rights,—may be translated: "An action is nothing else than the legal power of prosecuting before the Courts what is due to any one" Hence, acording to Heineccius, "An action is not a right, but a means of prosecuting a right." "*Actio non est jus, sed medium jus persequendi.*"

in the strict sense,—or statutes,—but also all arbitrary or peculiar rules and principles of the law; or in other words, so as to include the whole of the *jus civile* or *nomos idios* as conceived by the Roman lawyers, and before them by Aristotle. But in doing this we must guard against the error of supposing that the term, law, as thus defined, will include all that is now included under the term, *the law*, in its wider and more common sense of *jus*. For in this sense the law includes not only the *jus civile*, or peculiar law of the state, but also the *jus gentium*, "or *jus naturale*"; which by our new definition is excluded. Nor is it necessary for us to deny the existence of the *jus naturale*, *or natural right:* all that it is necessary to affirm is, that it is not part of the law as we now define it.

But, in accepting this view of the case, we necessarily affirm with Markby and Holland, that the judges in determining controversies will not be confined to the law, but must resort also to matters outside of the law. For it is the admitted function of the state through its judges to administer justice; or in other words, to enforce rights; and to do this it is necessary to have resort to equity, justice, or natural right; which terms denote merely the aggregate of the principles by which rights are determined. In other words, according to our definition, the law of private right would consist merely of the doctrine of actions; but these, according to a fundamental maxim both of our own and the Roman law, (*ubi jus ibi remedium,*) would have to be determined by a resort to the doctrine of rights, or natural right; which, though outside of the law, would still furnish the principles by which the question of right, or in other words, the merits or justice of the case, would have to be determined. Thus modified, the theory would conform precisely to that of Hobbes; and in this manner justice and the law instead of being antagonized, as they are under the present form of the theory, would be reconciled; and the aggregate of the two—which, as under our present hypothesis it can no longer be called *law*, we may call *jus*—will conform precisely to that which is now denoted by the term, *the law*. Hence, it will be perceived, the modification of the *legal* theory suggested by Markby and Holland, which was regarded by them as not materially affecting it, in fact essentially changes it, and in effect converts it into the *jural* theory, and themselves unconsciously from *legists* into *jurists*.

CHAPTER VII.

UTILARIANISM.[1]

§ 1. The sole function performed by the principle of utility in Austin's theory is, to establish the supremacy of government, and its further discussion might therefore be dispensed with, were it not for the fact that practically the theory is used by Bentham and Austin, and by the utilitarians generally, apparently for the purpose of destroying the moral convictions or conscience of mankind; or, in other words, for the very purpose that, Austin says, is not within its scope or object, namely, "to crush the moral sentiments" as actually existing in the general conscience.[2]

Of this, Austin's own use of the theory furnishes a type. In his view, "the *moral sense, practical principles, conscience,* * * * are merely convenient cloaks for ignorance or sinister interest;[3] and the terms *just* and *unjust*, when used otherwise than as denoting conformity, or non-conformity to the Sovereign Will, are to be regarded as "a mischievous and detestable abuse of articulate language."[4] But in his Austin was not only in error, but inconsistent; for elsewhere, in expounding the theory of utility, he is emphatic in asserting that, according to it, conduct is to be determined by rules; that such rules, from the nature of the case, must, by the great mass of mankind, be accepted "on authority, testimony, or trust"; and that the acts enjoined or forbidden by these rules are invariably accompanied by a moral sentiment or feeling, or "a sentiment or feeling of approbation or disapprobation," which is "inseparably connected in the mind with the thought or conception of such acts."[5] But when he attacks the authority of the common notions of right and wrong, justice and injustice, he forgets the true principle of his theory, and uses it as though it were an effective argument for his purpose, instead of being, as it is, an argument by which the common moral notions

[1] The subject of this chapter is treated in Right and Law, cited *supra*, and what is there said is here to some extent repeated; but it is now more fully developed.

[2] Jur. 120.

[3] Id. 221.

[4] Id. 223.

[5] Jur., 118, 119, 127.

of mankind, and especially those of justice, may be vindicated. It becomes necessary, therefore, to examine the theory of utility, with a view of seeing how far its claims to supplant all others are justified; and upon such investigation it will be found that the theory is not merely untrue, but that it is without definite signification, or, in other words, nonsensical.

It is generally assumed when we speak of the principle of utility, or, as it has come to be called, *utilitarianism*, that we have in view a single, consistent theory of morality; but in fact there are embraced under the one name several distinct and irreconcilable theories. These grow respectively out of the several different meanings of the term, *utility;* which, though apparently simple in meaning, is extremely ambiguous. For, it is obvious, the term is a relative one, implying some man or men whose welfare is promoted, and its meaning must therefore vary according to its correlative.

When applied to a single individual, the meaning of the term is clear. It denotes the interest or welfare of the individual referred to. When used with reference to a class, it is equally clear, properly speaking, that it denotes the interest or welfare of every individual of the class. For to say that anything is useful to two or more, or any number of men, is to say that it is useful to each of them. If this be not the case, the expression is inaccurate; and we should say, not that it is useful to the class, but that it is useful to some, or most of the individuals composing it. Hence, to say that anything will be useful to the community, or to mankind, is to say, if we speak accurately, that it will be universally useful, — that is, useful to every individual of the community or race.

These are the only definite meanings of which the term is susceptible, and hence there can be only two admissible expressions of the principle of utility, — which may be called respectively the theory of individual, and that of universal utility; the first of which asserts that to every individual his own good or interest is the only test of right and wrong; and the latter, that whatever is shown to be for the good or welfare of every individual of the community or race must be right; or, in a negative form, that whatever is pernicious or contrary to the welfare of any individual cannot be right.

This, however, is not the theory of general utility advocated by Bentham and Austin; which is something

altogether different. Properly speaking, indeed, the term *general utility* would seem to denote that which is universally useful; but according to a common usage, and therefore allowable in familiar speech, it is also used to denote only that which is useful in most cases. But in this sense the term is not logically serviceable, for its meaning is indefinite, and unsusceptible of precise definition, and it cannot be determined what is the proportion of individuals whose welfare is to be considered,—whether a mere majority, or three-fourths, or nine-tenths, or more or less. The theory is, therefore, as we have observed, nonsensical, or without definite signification.

Bentham struggles with this difficulty, and arrives at two different solutions of the problem, both evidently untenable. One of these is based upon the apparent analogy between the state or community, and the natural man; that is, he conceives the state as an actual being, susceptible like a man to pleasure and pain, and of being compensated for pain in one part by pleasure in another.

"That which is conformable to the utility or to the interest of an individual," he says, "is that which tends to augment the total sum of his happiness. That which is conformable to the utility or interest of the community, is that which tends to augment the total sum of the happiness of the individuals who compose it." Or, as Mr. Bain states, he defines utility as "the tendency of actions to promote the happiness and prevent the misery of the party under consideration; which party is usually the community in which one's lot is cast." But Mr. Bain's mode of stating the proposition is obviously a mere attempt to cover up the difficulty with words; for, as we have observed, there cannot be such a thing as happiness or welfare, except as existing in actual, sentient beings; and there cannot, therefore, be a happiness or welfare of the community distinct from that of individuals.

Bentham's proposition, viz: that the welfare or happiness of a community is "the total sum of happiness of the individuals who compose it," is a little less indefinite, but hardly less objectionable. It, in effect, regards happiness in the abstract, without considering in whom it may exist, or the proportions in which it may be shared. Accordingly, he gives specific rules for calculating utility, which are the same in the case of a community as in that of the individual—the process being to calculate, by what he calls a process of moral arithmetic, on the one hand

all the pleasures, and on the other all the pains, which a given act or class of acts may have a tendency to produce, and to strike a balance between them. Similarly in the case of the state, if all the pleasures are experienced by one set of individuals and all the pains by another, the rule will still apply; and if the pleasures of the one set are greater than the pains of the other, the act or class of acts will be useful. Hence, it may even happen, considering the difference of men's sensibility to pleasant or unpleasant impressions, that the pleasures experienced by a minority may be greater than the pains experienced by a majority; and in such case the act or class of acts, according to the definition, will be useful and therefore right—a theory obviously absurd, but so consonant to human infirmity as to be unconsciously very generally acted upon.

This is the theory of Bentham, as given in "The Theory of Legislation." He seems, however, not to have been satisfied with it; and at all events makes another effort to solve the difficulty, and arrives at another and altogether different solution. This is, that the happiness or interest of the majority must govern—a theory already asserted by Hutcheson, Beccarria, and Priestly, the last of whom he says "was the first (unless it was Beccarria) who taught my lips to pronounce this sacred truth, that the greatest happiness of the greatest number is the foundation of morals and legislation." But this may be fairly called an execrable maxim; for it cannot be asserted that the advantage of any number of men is a sufficient justification for the infliction of an injury, even upon one innocent individual. There may indeed be exceptional cases, in which the safety of the state or of a community may absolutely require the sacrifice of the individual, and it may be the duty of the individual to submit to this sacrifice, and the right of the state to require it; but the general principle must always obtain, that every man's life and person are his own, and cannot, unless by virtue of some clearly defined right, be converted to the use of another man, or of any number of men. To assert that any innocent man's property or his person may be rightfully violated, or any hurt done to him, whenever the advantage of an undefined majority can be secured thereby, is a proposition too shocking to the conscience and to the intelligence of mankind to require discussion.

§ 2. The most approved exponent of the doctrine of

utility in modern times is Mr. Mill, to whose views we have already briefly referred. As we have seen, he repudiates altogether the doctrine of individual or private utility; and hence, consistently enough, allows of the idea of duty and even of the most supreme self-devotion. But a still more singular emendation made by him of Bentham's theory is the following:

"That first of judicial virtues, impartiality, is an obligation of justice. * * * Society should treat all equally well who deserve equally well of it * * * this great moral duty being a direct emanation from the first principles of morals. * * * It is involved in the very meaning of utility, or the greatest happiness principle. That principle is a mere form of words, without rational signification, unless one person's happiness, supposed equal in degree, * * * is counted for exactly as much as another's. These conditions being supplied, Bentham's dictum, 'Everybody to count for one, nobody for more than one,' might be written under the principle of utility, as an explanatory commentary."

But this gives to Bentham credit which he by no means deserves. He may, indeed, in portions of his work, have illogically made use of this, as well as other familiar principles, but it does not form a part of his theory, nor is it consistent with it. For, according to his fundamental principle, nobody's interest is counted except that of the individual affected. Nor is the proposition consistent even with the theory of general utility illegitimately assumed by Bentham; for, as we have seen, the two forms of this theory, as stated by him assert—the one, that the greatest amount of happiness is the standard, without regard to the individuals whose happiness is affected; and the other, that the happiness of the majority is the standard.

If, indeed, this principle of equality of value in the moral and jural claims of men can be assumed, as unquestionably it may be, then we have no further use of the theory of general utility. For this principle, as has been admirably shown by Mr. Spencer and others, is itself a sufficient foundation, at least, for the theory of justice. Hence, the theory of Mill cannot properly be called, as it has been, even "sublimated Benthamism." It is, in fact, a theory altogether different, and antagonistic to it.

As thus amended, the theory is morally unobjectionable; its defect,—if such a charge may be made against

so celebrated a logician as the author,—is want of logic. Like Bentham and Austin, and other utilitarians, Mill has failed to perceive that the term "*general utility*" is absolutely without definite significance, and, therefore, cannot serve as a sufficient premise for any theory. Accordingly, he uses the term in various senses; in one, which I have quoted, he asserts that the standard is "the greatest amount of happiness altogether," thus seeming to agree with Bentham, in his first statement of the theory; according to which it is the greatest amount of happiness that can be secured, even though that should be of the minority; but elsewhere he says, "that the utilitarian's ideal of what is right is, not the agent's own happiness, but that of all concerned"; or, in other words, "the good of the whole." But this is an altogether different proposition, not only from that of individual, but also from that of general utility, and in nowise different from what is admitted by all moralists, viz.: that utility, or tendency to promote the happiness of mankind, is, if not of the essence, at least a property of right, and therefore universally to be predicated of it; or, to state the proposition in a form more practically useful, that no class of acts which, in their general consequences are pernicious, or contrary to the welfare of any man, can be right. In this negative form, the principle of utility is entirely unobjectionable, and must be accepted by all.

It is, therefore, obvious that utilitarianism is merely another instance of error resulting from the use of undefined, ambiguous, and nonsensical terms; and our observations on this head may be closed by adverting to the fact that this is true with regard to nearly all the moral and political speculations of the day, and by the further observation that the pressing need, in the subject we are discussing, as well as in others, is, not so much the acquisition of new knowledge, as to get rid of the false semblance of knowledge which almost wholly usurps the place of the true science, and thus prevents all rational speculation.

CHAPTER VIII.

OF THE TRUE NATURE OF THE LAW AND OF RIGHTS.

§ 1. In the preceding chapters of this work our attention has been devoted to a critical examination of Austin's theory of jurisprudence, with a view of observing its inconsistencies, and the absurd consequences involved in it. To complete our view of the subject, the remaining chapter will be devoted to a brief statement of the antagonistic theory, referred to in our introductory chapter as the Common Law Doctrine, and elsewhere as the *Jural* Theory of the law; and to a cursory, but I trust sufficient, consideration of the principal arguments for and against it.

This theory, as there stated, rests upon the proposition that it is the function of government to establish justice, or to secure the observance of rights; and from this proposition,—if we define the law as including all the rules and principles by which the Courts are governed in determining controversies between men as to their mutual rights,—it follows that justice, or right,—which, as we have observed, is but the aggregate of the principles by which rights are determined,—is an integral part of the law; or, more specifically, of the law of Private Right, (*Jus Privatum*;) which constitutes the principal or *substantive* part of the law, and the only part that it is here material to consider, and which consists wholly of the doctrine of *rights*, and that of *actions*.

But rights also constitute one of the principal topics of Morality, and Right or Justice, one of the principal departments or divisions of that science. Hence, if the terms are in both cases used in the same sense, it follows that the doctrine of rights, or of Right or Justice, is a province common at once to the Law and to Morality; and, as is well observed by Mr. Amos, that "the term *rights* is the central term at once of the Science of Law, and of the Science of Morality." (The Science of Law, 88–89.)

The principal question involved in this discussion is, therefore, to determine whether the rights with which the

law deals are rights in the proper sense, and therefore the same as those treated of in Morality, or whether—as is claimed by the *legists*,—they are something of an essentially different nature.

The latter proposition has been considered exhaustively, and it has been shown that the use of the term rights, and of the terms, Right or Justice, in the sense attributed to them by Austin and his followers, is unwarranted by correct usage, and that they stand absolutely alone in thus using them. It is now proposed to show affirmatively that the rights treated of in the law are rights, in the proper and ordinary sense of the term, and the identical rights treated of by moralists; and, hence,—as above asserted,—that Justice or Right is, in the same sense, at once a part of the law of Private Right, and a department or branch of Morality.

The arguments for this proposition will be drawn (1) from the significance of the terms, right and rights, and related terms, as determined by uniform and approved usage, and from the authority of jurists and philosophers, and of the law itself; (2) from the historical development of the law; (3) from an actual examination of the rights recognized in the law, or, as they are called, *juridical* rights; and (4) from a consideration of the nature of jurisprudence, or the science of rights: after which, in conclusion, we will consider the principal objections that have been urged against this view.

§ 2. (1) The term, *a right*, or *rights*, and its numerous related terms,—such as *jurisdiction*, *judicial*, *courts of justice*, *the administration of justice*, *equity*, *good conscience*, *reason*, etc.,—all of which imply that the function of government is to administer *justice*, or to cause rights to be observed, are obviously used in the law in their ordinary and proper sense, as may be verified by reference to the following passages taken from approved authorities, and which might be indefinitely added to.

"The Common Law of England is the common rule for administering justice within this kingdom, and it asserts the royal prerogatives as well as the rights and liberties of the subject";[1] hence, jurisdiction is defined as "an authority or power which a man has to do justice in causes of complaint brought before him."[2]

"It is to be observed," says Coke, "that the Common

[1]Sir Matthew Hale, cited, Jacob's Law Dic., "Common Law."
[2]Id. "Jurisdiction."

Law of England is sometimes called right, sometimes common right, sometimes *communis justitia*. In the Great Charter the Common Law is called Right. *Nulli vendimus, nulli negabimus, aut differemus justitiam vel rectum.*" "In the statute Wm. I., C. 1, it is called Common *Droit. En primes voet le roy et commande * * * que common droit soit fait a touts, aussi bien a poers come aux riches, sauns regard a nullay. * * * And Fleta saith:* "*Quod communis justitia singulis puriter exhibeatur.*" And all the commissions and charters for execution of justice are *facturi quod ad justitiam pertinet secundem legem et consuetudinem Angliæ.*"[1]

So it is explicitly asserted by Coke, that "the law of Nature is part of the law of England"; and "this," he says, "appeareth plainly and plentifully in our books."[2]

And the same proposition is explicitly asserted and explained at length by Fortescue, in the "De Laudibus Legum Angliæ," and by St. Germain in "Doctor and Student."

The notion is also expressed by Coke in his celebrated saying that, "*nihil quod est contra rationem est licitum*," and that "the common law itself is nothing else but reason" (Co.-Lit. 976); and in the more accurate definition of Lord Mansfield, that the law is nothing else but reason modified by habit and authority; and in the assertion of Burke, that it is "the collected reason of ages, combining the principles of original justice with the infinite variety of human affairs"; and generally in all except the most recent of the text-books and reports.[3]

The notion of natural rights and justice, and that their observance is the end of the law, is thus embodied in our most familiar language, and has come to be a common heritage of the race, of which it cannot be robbed by all the assaults of a vain philosophy. It has, in fact, constituted the animating principle of progress in human civilization. Whatever has been gained in rational liberty, in a better political organization, and in the greater security of life, liberty and property, is, in fact, due to those who, by Bentham, are contemptuously called "fanatics armed with natural rights," and by Austin, "igno-

[1]Co.-Lit. 142a.

[2]Calvin's Case, 7 Coke's R. 12, 13.

[3]Bonham's Case, 8, Coke's Rep. 118; Hobart, 87; Bishop's First Book of the Law, C. 9, § 90; Forbes *vs.* Cochvam, 2 Barn. & Cres. 471; Coggs *vs.* Bernard, 2 Lo. Raym. 911; Pasley *vs.* Freeman, 3 T. R 62; Millar *vs.* Taylor, 4 Burr. 2312; O'Mychum *vs.* Barker, 1 Atk. 46; Davis *vs.* Rowell Wills, 48-51; Lyle *vs.* Richards, 9 G. & R. 351.

rant and brawling fanatics, who stun you with their pother about liberty." For the principle of justice, though suppressed by the prevailing philosophy, is, in fact, not only the fundamental truth of jural, and of all political, and social science, but also the practical weapon by which men have fought out their political emancipation.

§ 3. (2)[1] The nature of the development of the law has been much misunderstood by the more recent English jurists; and this misunderstanding, like others to which I have alluded, is also the result of a failure to distinguish between the different parts of the law. Right or justice is not susceptible of development in any other sense than in the sense in which the truths of mathematics and other sciences may be said to be developed; that is to say, they may be gradually discovered, but the development is in our knowledge only. But it is otherwise with the law of actions, which is, in fact, gradually developed, in the sense that it is actually brought into being. Hence, confining our attention to the Law of Private Right, the historical development of the law consists wholly in the development, not of rights, but of actions, or means of enforcing rights. For right itself, or justice, is the same at one period as another, and is at all times an integral part of the law.[2]

In its essential features the development of the law has been the same in the case of our own, and in that of the Roman law; and from this, and our knowledge of human nature generally, it may be assumed that it is governed by general laws, which, under similar circumstances, will always produce essentially identical results.

These results may be stated with substantial accuracy as follows:

Every system of positive law commences with the mere establishment of a jurisdiction, or power to administer

[1] The subject of this and the following sections is treated of more at length in "Right and Law," and in "The Law of Private Right," cited *supra*; to which the reader, if he desires to pursue the subject further, is requested to refer.

[2] "The principles of natural right (*naturalia jura,*) which are observed equally by all peoples, being established, as it were, by Divine Providence, remain always firm and immutable; but those which each state has established for itself are often changed, either by tacit consent of the people or by some later law." (Pandects.)

And to the same effect it is said of our own law by Coke:

"*Leges naturæ,*" (*naturalia jura,*) "*perfectissimæ sunt et immutabiles; humani vero juris conditio semper in infinitum currit, et nihil est in eo quod perpetuo stare possit; leges humanæ nascuntur vivunt et moriuntur.*" Calvin's Case, 7 Coke's R. 25.

justice; which is at first generally vested in a king or monarch, but afterwards delegated to regular courts for the administration of justice. At this period justice, or Natural Right, constitutes the whole law of the state.

From this beginning, the law of private right, or rather the law of actions,—which, as we have observed, is alone capable of development,—is developed by the courts, in the main without legislative interference; and its development,—with the exception of a few statutory provisions,—is the result of the exercise of *jurisdiction*, and not of legislative power; and hence the law of private right is to be regarded as an expression of the judgment, not of the will of the state.

The exercise of jurisdiction,—*ex vi termini*,—consists merely in devising appropriate remedies, or actions for recognized rights; and in the performance of this function the Courts, and more especially the Courts of Equity, have, in the main, avowedly governed themselves, in the determination of cases, by the principles of justice, or natural right. Hence, every step in the development of the law, (if we leave out of view the comparatively limited influence of statutory legislation,) has consisted in the application, or attempted application, of principles of natural right to cases actually presented; and hence, in theory, and, so far forth as the functions of the Courts have been well performed, in fact also, the law of actions is but a practical application of the principles of right.

The fact that the principles of natural right, or most of its principles, are, and for a long time have been, recognized by the Courts, and some, of course, by the Legislature, is not inconsistent with the proposition that they still continue to be principles of natural right; but, on the contrary, constitutes the most conclusive proof of their truth. For it may be asserted as a universal proposition, that in a progressive civilization no principal can endure in the law if inconsistent with justice. Thus, the *jus civile* of every system, that is, the portion of the law that is arbitrary and peculiar, though commonly supposed by modern English jurists to be immutable, except by legislation, is, in fact, as Coke asserts, the mutable and temporary part of the law; while the part of it which consists in Right or Justice is alone permanent and immutable. Hence, if we compare the law as it existed in the time of Edward I., or even at a much later period, with the law as it exists today, or, if we compare the law,—as opposed

to Equity,—as it was at the time of Blackstone, with the present law, we find there is hardly anything common between them except the principles of natural right recognized from the earliest times, throughout all stages of the law, to the present day.

The process of development has been the same in the Roman as in our own law, but the former has come to an end, while ours remains, it is hoped, to be the subject of a further and higher development. Such development, however, will not consist in contemning and rejecting the methods by which such noble results were obtained by the Roman lawyers; or in rejecting the moral convictions and moral faith, to which is owing the present European civilization; nor in the attempt to substitute for the principles of natural right the arbitrary enactments of codes: but in more consistently recognizing the sacredness of rights and of justice, and in the logical development of the principles of Natural Right, as established in the common moral convictions or conscience of the civilized world.

§ 4. (3) A mere enumeration of the rights recognized in the law will be sufficient to show that they are none other than those *natural* or *moral* rights,—so despised by the legists,—which are recognized universally by the people.

These rights are of two general classes, namely, rights of *ownership* and rights of *obligation*. Under the former head are included the right of property, the right of personal liberty or of self-ownership, and the right of husband in wife, and parent in child, etc., and *vice versa;* under the latter, the right to the performance of contracts, the right to restitution or compensation for injuries, and certain rights which arise *ex mero jure,* without the intervention of contract or delict,—as, for example, the right of salvage in case of a derelict ship. The last class is a limited one, and may be left out of view in the present connection; it is mentioned merely to make our enumeration complete.

The above classification covers all rights, juridical or non-juridical, and it is evident that they are all recognized at once by the law and by the people generally. Hence, it is clear, a juridical right is nothing more than a *natural* or *moral* right, with an action or remedy provided for it by law; and that the law itself, "in principle at least," is merely "justice armed with force." (Cousin, The True, the Beautiful, and the Good, Lecture 15.)

These rights are recognized in all systems of law, and in

all civilized countries they are efficiently protected; and, in fact, the civilization of every country is to be judged by the more or less effectual manner in which this is the case. Hence, juridical rights are obviously the same throughout the civilized world; and a man may travel anywhere without finding that he has a different set of rights in one country from what he has in another. Everywhere, for instance, he will find his right to his watch, to his personal apparel or other property, to the repayment of a loan, or to the performance of any other contract, or to restitution or compensation for injury,—in short, nearly every right he has at home equally recognized and enforced.

Hence, it is evident, in every country the doctrine of rights is part of the law of private right, and this part of the law is everywhere the same. And thus far the noble prophecy of Cicero is in fact realized: "*Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omnia tempora una eademque lex obtinebit.*"

§ 5. (4) Jurisprudence we have defined as the Science, or, more accurately, the Science and the Art of Justice, or of Rights. It is its fundamenta characteristic that it deals, not with *actual*, but with *rightful* powers, or rights; and that its fundamental problem is to determine, not the historical question as to what powers men, either as individuals, or collectively as the state, may actually have, at any particular time or place, but the theoretical question as to the powers which either individuals or the state ought to have, either in general, or under given circumstances of time and place.

This, with reference to theoretical jurisprudence, is sufficiently obvious; but the proposition is equally true, though not so apparent, with reference to practical jurisprudence. For no fact is more certain, though obscured in this country and England by the prevailing philosphy, than that it is the function or duty of the state to administer, or, (in the language of the Constitution of the United States) to "establish justice," and that this duty, and consequently justice or natural right, are universally recognized by civilized states.

That this duty should be imperfectly realized is simply due to the necessary and inevitable imperfection of all human instrumentality; and from this fact arise numerous difficulties and apparent objections, which will hereafter be considered. But, for the present, we will assume the

view of the nature of jurisprudence above given to be correct, and will proceed to show that it is confirmed by a more detailed examination of the subject.

As the term "a right" includes in its signification, or connotes, the idea of rightness, it would seem to be necessary in order to render our definition of rights complete, to define the adjective "right," or the term "right," as used to denote a quality; but to do this would involve the solution of the metaphysical problem as to the nature of right and duty,—a question about which theories widely differ, and which, in the present state of ethical science, cannot, perhaps, be satisfactorily solved; and which is, in fact, the rock upon which the English jurists have been wrecked. But this, indeed, is a problem which it is unnecessary for us to consider; for it is manifestly indifferent what theory be adopted, provided only that it asserts the reality of moral distinctions.

It may, however, be fairly asked: By what standard or test are right and wrong to be judged? And this is a question that must be answered. The answer to it is that there are, in fact, two standards, intimately related to each other, but which yet must be distinguished; namely, the practical, and the theoretical standard,—the former being the standard by which our conduct, in matters affecting others, is to be governed; the latter, the standard by which our judgments are to be formed.

In matters that concern ourselves alone, these two standards coincide; for to every man the practical test of right and wrong must be his own conscience, or moral convictions. But in matters of common concern it is otherwise, and for such cases another standard must be sought; and this can be no other than the common moral convictions, or general conscience of the people.

The nature of this *consensus* of moral conviction, or general conscience of the people, the method of its genesis, its rightful authority, and the instrumentality by which it is enforced,—which is public opinion,—is a subject of fundamental importance in jurisprudence, and in politics generally, but is too extensive to permit of discussion here. But it may be asserted, as a fact which the reader can verify for himself, that this general conscience of civilized men, or, in other words, positive morality, ought to be, and, in fact, ultimately and in the long run is, the paramount predominating political force in the civilized world, and that it is this that makes civilization possible;

and also that the superior development of this force in modern civilization constitutes the essential difference by which it is to be distinguished from that of the ancient world, and other less advanced civilizations.

Nor can it be doubted, either that this is, or that it ought to be, the practical test or standard, in all matters of common concern; and this for three reasons. For, first, the positive morality of the present age is the result of the never-ending struggle of mankind to realize theoretical morality,—a struggle to which, from the beginning of history, the highest intellect and conscience of the race have been consecrated,—and it therefore carries with it the strongest presumption of its truth; secondly, there is no alternative between the acceptance of this standard, and submission to arbitrary power, and hence free government is possible only to the extent that this general conscience is developed; and thirdly, men, as it were by some instinct of their nature, in fact accept and submit to this test as the true standard of practical morality; for, as is well observed by Mill, "the customary morality,—that which education and opinion have consecrated,—is the only one that presents itself to the mind with the feeling of being, *in itself*, obligatory."[1]

It is, however, evident, in view of the difference in the morality of different peoples and ages, and of different classes and individuals in the same age and country,—a difference that really exists, though greatly exaggerated,—that positive morality cannot be accepted as infallible; and for this the reason is very apparent. Morality depends upon a few fundamental principles, from which its subordinate principles and rules may be logically deduced; but, as Hobbes observes, the generality of men are so far from being capable of consistently applying the rules of logic, "that they know not what it is." Hence, while all men reason to a certain extent, they do not reason consistently; and thus, in practical matters, their only safe guide is experience; by which their notions are constantly corrected. Thus, in the main, in practical results, positive coincides with theoretical morality; but it differs from it in this, that it consists of rules rather than of principles; and that these rules are deduced, not by accurate logical deduction from principles, but by a rough kind of induction or experiment. From which it results that the rules themselves are not accurately formu-

[1]Utilitarianism, Ch. 3, pp. 38, 39.

lated, but are made to conform to truth only by the aid of numerous exceptions, and hence are logically unserviceable. On the other hand, scientific morality accepts no proposition except as universally true, both immediately and in all its logical consequences, and admits no conclusions except such as can be rigidly demonstrated from the principles assumed. It is, therefore, a true deductive science, as certain in its method and in its results as Geometry, or, to take a more nearly related instance, Political Economy.

It is, however, always to be remembered that the principles of scientific morality, though conclusive on the conscience of him who is convinced, cannot become practically operative as a common rule or standard of right and wrong, until they meet with general acceptance, and become established in the general conscience, or common moral convictions of the people. And hence, the practical end of scientific jurisprudence, in relation to matters of common concern, is to enlighten the general conscience, and to correct and reform the moral convictions of mankind. To use the striking metaphor of Pindar, *Nomos* alone is King, and the function of Philosophy is only to advise.

Of the possibility of a scientific morality there cannot be any reasonable doubt; and I therefore say, with Locke: "Confident I am that if men would, in the same method and with the same indifferency, search after moral as they do after mathematical truths, they would find them to have a stronger connection one with another, and a more necessary consequence from our clear and distinct ideas, and to come nearer perfect demonstration, than is commonly imagined." And this is peculiarly and in the highest degree true of Jurisprudence, or the Science of Rights. For this science rests upon a few simple fundamental principles, about which there is not, and cannot be, any dispute.

Of these the principal are the following:

(1) The first is the conclusion reached in our review of Hobbes' theory of Rights, to which, in order to avoid repetition, the reader is requested to turn: it is, that *the rightful or jural liberty of the individual is limited, and limited only, by the rights of other individuals or the State.*

(2) To this is to be added the obvious principle, that *there is always a presumption in favor of liberty*, and,

hence, *where a right is asserted, either in an individual or in the State, that derogates from the liberty of another, the burden of proof is on him who asserts the existence of the right.*

(3) From this it follows that *the existence of a right in any one, derogating from the liberty of another, cannot be affirmed, unless it can be equally affirmed of all others standing in similar jural relations;* for the burden of proof rests upon him who asserts the right, and, according to the hypothesis, no reason can be assigned why such a right should exist in one, which would not, in a like case, exist in another.

Or, the proposition may be otherwise stated, by saying that *the jural liberty of all men, in the same case, is equal*,—meaning by the term, "*the same case*," a similarity of all circumstances material to the question of right.

(4) It is an obvious consequence from the nature of a right, that *one who has been unjustly deprived of its exercise should be restored to its enjoyment;* and it seems equally obvious, that *where restitution in kind is impracticable, restitution in value, or compensation, should be made.*

(5) To the above is to be added the principle of utility, in the negative form, in which it has been stated, viz, that *whatever can be shown to be, in its general consequences, pernicious or detrimental to mankind, is wrong.*

This principle is embodied, under the name of the *argumentum ab inconvenienti*, in one of the fundamental maxims of our law; and there are few principles more frequently referred to and relied upon by jurists than this. The maxim, as given by Coke, is *Argumentum ab inconvenienti plurimum valet in lege;* and he adds: "The law, that is, the perfection of reason, cannot suffer anything that is inconvenient; and therefore he says: "*Nihil quod est inconveniens est lictum*";* and that "judges are to judge of inconveniences as of things unlawful."

(6) *But in considering the question of inconvenience, regard must be had, not to particular, but to general consequences; or, in other words, not to the effect of the decision in the particular case under consideration, but to its effect as a precedent or rule.* For what is right or wrong, just or unjust, in any case must necessarily be so in other like cases; and *hence right, as well as morality generally, must consist of general rules applying to all cases of the same class.* This is insisted upon by all mor-

alists, and is but a statement of Kant's Categorical Imperative.

All of the above principles are, in fact, assumed in our law, and also in the Roman law; and the doctrine of Rights, as established in both systems, and in all systems, is, in the main, deduced from them.[1]

There does not seem to be any room for difference of opinion with regard to these principles; and hence all disagreement, as to the subordinate principles of right, must be regarded as resulting wholly from defects in the logic of one, or the other, or both, of the parties differing. If jurists, instead of losing themselves in metaphysical abstractions as to the nature of moral distinctions, would accept, as sufficiently verified, the fundamental principles of justice, assumed in all systems of law, and would address themselves to the task of applying to them the logical method, and of thus reducing to logical consistency the received principles of right, which have been with more or less consistency derived from these fundamental principles, it cannot be doubted that a substantially perfect unanimity could be reached, or that the law would thus be perfected. But, unfortunately, it is one of the worst vices of the *legal* theory, that it seeks to banish from the law Logic, or Reason, as well as Justice.

§ 6. There are numerous, and apparently formidable objections to the above views, as to the nature of the law and of jurisprudence; but these are apparent only, and a consideration of them will serve rather to confirm our theory than to raise any doubt as to its correctness.

(1) Until comparatively recent times the close connection, or rather, to the extent explained above, the identity, of morality with the law was generally recognized by jurists; who accordingly regarded the one, as well as the other, as belonging to their province, and were equally familiar with both. But this, unfortunately, is no longer true, at least in England; for, in fact, so far as we may judge from their published utterances, there is no other class of men who care or know so little about Moral Science as the modern English jurists; for, with regard to it, they do not merely participate in the general disregard and neglect into which it has fallen with other peo-

[1] I have elsewhere attempted to show this in detail. Right and Law, Book I; The Law of Private Right, Part III.
It has also, as we have observed, been shown, on the whole successfully, by Herbert Spencer, in "Social Statistics," and in "Justice"; and by Kant in the "Philosophy of Right."

ple, but regard it with affirmative dislike, as a delusion peculiarly pernicious to jurisprudence, and as indicating certain tendencies of human nature, which, like original sin, must be rooted out, before jural or political salvation can be hoped for. Hence has originated the feeling that there is some great and mysterious danger to be apprehended from admitting that the law has any connection with justice, or morality.

But this objection is obviously based on the failure to apprehend, or to observe, the essential distinction between justice, and the rest of morality. The law does not pretend to enforce morality, generally, but to enforce that part of it only which morality demands shall be enforced, namely, justice or right. With the duties of charity and benevolence generally the State does not,—or, at least, need not,—concern itself; but the observance of justice is at once the end of government, and the condition of its permanence.

(2) A more serious objection is that the law of private right, and even the part of it that treats of rights, is, to some extent, made up of laws and statutes, and, to a still larger extent, of customs; and there is an apparent difficulty in reconciling with our theory the existence of these elements; of which the one is accidental in its nature, and the other arbitrary.

There is, indeed, no difficulty in reconciling the co-existence of these three elements in the law, if we regard them simply as co-ordinate: but our theory asserts the paramount authority of justice or right in that part of the law of private right which treats of rights; and that neither statutes nor customs are co-ordinate and independent parts of right; and this proposition is apparently more difficult to accept.

The objection, however, is more apparent than real. Laws or statutes are mere acts of men, differing from other men only in being clothed with the power or right of legislation. Generically, they are of essentially the same nature as contracts, grants, and other expressions of human will, which, like laws, are valid or otherwise, according to the right of the party making them. Hence, when it is within the right of the legislator to determine any matter, the expression of its will with regard to it is conclusive; and rights may, therefore, originate in legislation precisely as in contract, or delict, which the moralist, as well as the lawyer, must recognize. But if the law is

in excess of the rightful power of the legislator, or, to use a technical expression, is *ultra vires*, it has no more force or validity than the act of a private individual, which is beyond his right.

Hence, the existence or non-existence of rights cannot be predicated from the mere enactment of a law, but their validity must depend upon the existence of a precedent right in the state. And this is true, whatever theory be adopted as to the extent of that right. For, even if it could be assumed that the right of the state is absolute, this could only be on the ground that this is a principle of reason or natural right; and a right created by a law would still be a true right, or, as we may call it,—precisely as a right created by contract or grant—a natural right.

Laws or statutes, therefore, do not enter into Right otherwise than as mere elements in the problem of determining rights; and their validity and effect must ultimately be determined by some principle of natural right, even if it should be none other than that the right or power of the state over the lives and fortunes of its subjects is absolute.

With regard to custom, the case, *mutatis mutandis*, is the same. A custom may or may not give rise to a right, and whether it does so or not is a question to be determined by some principle of reason or natural right. Thus obviously, on principles of natural reason, custom enters into and forms part of contracts, and is also an important element in the determination of rights arising from delict; and it otherwise—and this is its most important aspect,—often has the force of law. To explain why this is the case would be to enter into too large a subject to be treated here, but it is admitted that custom, in order to be law, must be reasonable, and its effect, therefore, like that of laws, is to be determined by principles of reason or natural right. Hence, like laws or statutes, customs do not of themselves originate rights, but only by virtue of the principles of Right, and they therefore enter into the determination of rights merely as elements of the problem.

These observations directly apply also to precedents or judicial decisions, which, though entitled to respectful consideration as authority, are binding only when they enter into the general habits of the community, and thus become established by custom.

(3) It is a very common opinion, and if true a serious objection to our theory, that the courts do not and cannot

determine questions of right by the principles of abstract justice alone. They are in many cases, it is said, prevented from doing so by some positive rule, either enacted by the legislature or established by precedent. But this objection, like others, arises from the habit already referred to of looking at the law as a homogeneous whole instead of distinguishing its separate parts. In questions of procedure, the judge may often be unable to do justice. He may, for instance, be prevented from doing it by want of power or jurisdiction; or, he may even be compelled, or at least judges often think themselves compelled, to do an act of injustice,—though this is more generally the fault of the judge than of the law. So, too, in determining the practical question of action or no action, he may be prevented by the arbitrary or accidental rules of the law from doing justice. But in determining the question of Right, neither judicial nor legislative authority is of any weight except as a mere element in the problem, but precisely the same problem is presented to the jurist as to the moralist, namely: in view of all the elements of the case, including statutes and customs, if they bear upon it, to determine the simple question of right or justice presented, which from its nature can be determined only by principles of natural right or reason; nor is there a conceivable case in which he will be justified in looking upon the question in any other light.

Whether when the right shall be determined there will be a corresponding action or not, is another question, and one on which statutes and precedents may exert more or less influence; but the two questions are altogether distinct, and can only be confused at the expense of the integrity of the intellect, and of the conscience of the judge.

(4) Hence, as the rule of decision in determining actions is, to some extent, different from that by which the judge is to be guided in determining the mere question of right, there must ensue in some cases a discrepancy in results. For while in theory actions should correspond precisely with rights, in practice they fail to do so, and thus many rights are without the corresponding remedy. Hence, in practical jurisprudence, we have the distinction, unknown to the theory of right, between actionable and non-actionable, or, as they are otherwise called, between juridical and non-juridical rights—a distinction in theory extremely important to observe, and with reference to

practice no less so; for there is no fallacy more common, or more pernicious in its consequences than to infer, from the non-existence of an action or remedy, the non-existence of the right.

But the contrary is not only an obvious and necessary deduction from the very notion of right, but is very clearly recognized in our law. Thus, it is a well-settled principle that a right barred by the statute of limitations continues to exist, though the remedy be forever gone. So, also, it has been repeatedly held with reference to contracts declared void by the usury and banking acts, and with reference to conveyances of married women declared void by statute on account of defective acknowledgments, and with reference to marriages technically void for want of compliance with statutory provisions as to the mode of solemnization,—that rights existed under and by virtue of such contracts, conveyances, and marriages, though expressly declared to be void by statute; and accordingly, subsequent statutes declaring them valid have been upheld, on the ground that the validating acts did not create new rights, but simply provided remedies for rights already existing. Otherwise such laws would be clearly unconstitutional; for on the theory that there were no pre-existing rights, they would operate to transfer the property of one set of persons to another; which is forbidden by all the American Constitutions, State and Federal.[1]

The existence of non-actionable rights is also very fully recognized, and many important consequences deduced from it in the Roman and in modern Civil Law.[2]

The obvious distinction between *actionable* and *non-actionable*, or *juridical* and *non juridical* rights, is not, however, to be confounded with the distinction made by Austin and his school, (heretofore alluded to,) between *legal* and *moral* rights. The latter is altogether untenable; for, as we have already observed, the term a right implies, as part of its essential signification, the quality of rightness; and hence there can no more be a right that is not a moral right than there can be a four-sided triangle or a square circle.

[1] Sichel *vs.* Carillo, 42 Cal. 493; Syracuse Bank *vs.* Davis, 16 Barb. 103; Dentzel *vs.* Waldie, 30 Cal. 144; Goshen *vs.* Stonington, 4 Conn. 309.
[2] Savigny on Obligations, Brown's Abridgement, §§ 5-11.

Finis.